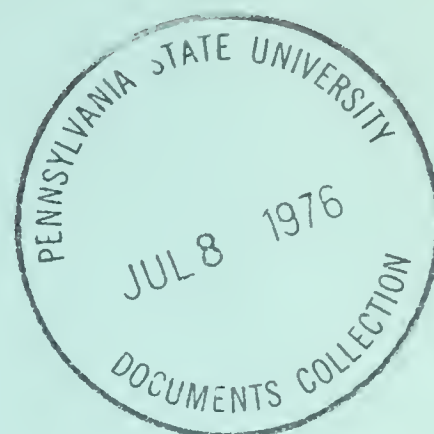


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MODERNIZATION AND IMPROVEMENT OF
NEW YORK'S RIPARIAN LAW



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MODERNIZATION AND IMPROVEMENT

OF

NEW YORK'S RIPARIAN LAW

by

William H. Farnham

FINAL REPORT

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PREFACE

Laws pertaining to water, and its conservation, development and use often are inconsistent. The laws present uncertainties and provide inadequate guidance to those charged with either the public or private management of water resources. This volume seeks that necessary balance between certainty so that we may act, and flexibility so that we may accommodate to change, as we consider charting the future use of New York State's water resources for the best social, economic and environmental advantage.

When the Cornell University Water Resources Center (later the Water Resources and Marine Sciences Center) was established in 1964, an early high priority research task was concerned with water law in New York State. Collaborative efforts of the Water Resources Center, the New York Legislature (under the auspices of the New York Temporary State Commission on Water Resources Planning which was chaired by the late Senator Frank Van Lare and his successor Assemblyman Albert Hausbeck) and the Office of Water Resources Research of the U.S. Department of the Interior, enabled William H. Farnham, Professor of Law Emeritus, Cornell University, and legal consultant to the Water Resources Center, to devote nearly ten years to an intensive study of New York State's water laws.

An early accomplishment of this program was the enactment of an amendment to the New York Conservation Law (section 429-J, Chapter 598 of the Laws of 1966). This amendment clarified uncertainties in the Conservation Laws in relation to harmless alterations of streams or lakes, and was intended to encourage the beneficial development and use of New York's water resources.

The use and value of water are pervasive, they effect many aspects of society, and they pose questions of great difficulty. As a result there are often actual or potential conflicts among users of water. Consequently the New York State legislature was cautious in attempting further statutory changes in the State's water laws. While this caution is to be commended, laws pertaining to water need clarification.

In order to bring about a greater awareness of changes in water laws which could benefit New York State citizens, Professor Farnham has brought all his efforts together in this volume. The report contains, among other matters, an unexcelled review of water law cases affecting New York State, and proposals and justifying arguments for further changes in New York State's water laws.

During the decade in which this work was accomplished, a number of persons provided noteworthy assistance. Three of these, the late Mr. Edward C. Ryan, Esquire, counsel to the New York State Department of Conservation; Mr. Armand Adams, Esquire, Attorney of Ithaca, New York; and Dr. Morris Cohen, Staff Director for the Temporary State Commission on Water Resources Planning, deserve special notice.

We are grateful to the New York State Legislature for publishing this work and for making it available for public discussion.

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RESEARCH PROJECT COMPLETION REPORT

Modernization
and
Improvement of
New York's Riparian Law

by
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Principal Investigator

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"Investigation of Water Rights and Water Law and the
Effects of These on the Development and Utilization of
Water Resources of New York State."


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CHAPTER 1

WHY MODERNIZATION AND IMPROVEMENT OF NEW YORK'S RIPARIAN LAW IS NEEDED

From its earliest days New York has looked to its version of the riparian doctrine for the solution of conflicts over the allocation of water from streams and lakes among those competing for privileges of user.² Although the New York statutes comprise hundreds of pages of water legislation,³ until 1966 New York had none which dealt any further with riparian rights⁴ than to recognize their existence expressly, and to disclaim any intention to impair them.⁵ In other words, until 1966, when sec. 15-0701 of the Environmental Conservation Law was enacted, the owners of New York riparian rights and governmental bodies, agencies and officers charged with the formulation and execution of governmental water-connected projects had no more knowledge of the extent and duration of such rights than was afforded by the decisions and opinions of the New York courts. Since these decisions and opinions appeared to be in conflict on several important points of riparian law, and were silent on many others, as of 1965 New York riparian law was uncertain to a considerable degree,⁶ and still is, since the legislation of 1966 merely made a beginning on the elimination of the many uncertainties existing at the time of its passage.⁷

Inconvenient as these uncertainties have undoubtedly been for many years, little consideration seems to have been given to the possibility of resolving them by legislation until about 1950; apparently because prior to that time the quantity of water available seemed ample, and because relatively few conflicts over water rights had been arising in New York. At mid-century, however, because population growth had begun to generate increasing and often conflicting water needs for agriculture, industry, municipal supply, power production, recreation and waste disposal, and because all too frequent water supply crises created by severe droughts revealed an urgent need for governmental dam and reservoir projects to conserve and augment the

available water supply, it became clear that at least some of the existing uncertainties in New York water law could no longer be tolerated.⁸

One undesirable consequence of these uncertainties was their discouraging effect on private persons and corporations contemplating investment in water-based enterprises.⁹ While the amount of such investment which has already been made despite the uncertainties in New York riparian law, and the lack of statistical evidence to substantiate the assumption that uncertainty in water law has a discouraging effect on private enterprise¹⁰ have created a doubt in some quarters as to the validity of such an assumption;¹¹ and while further basis for this doubt is afforded by the possibility that uncertainty as to the outcome of water litigation arising from uncertainty as to water rights may be as likely to discourage an affirmative decision by a party who is considering bringing suit to halt a riparian owner's use of the water as it is to discourage a riparian owner from initiating a water-based project,¹² complaints of New York farmers and industrialists against the New York riparian system have been too numerous and persistent to be ignored.¹³ It would therefore seem to be sound policy to resolve by legislation as many of the existing uncertainties in New York riparian law as can be so disposed of consistently with "an ethical commitment to the concept of fairplay,"¹⁴ which would seem to involve avoidance of substantial uncompensated infringement of existing riparian privileges and rights;¹⁵ and without sacrifice of the public interest in facilitating alterations in the pattern of water use in response to changes which will occur in the future, as they have in the past, in the relative economic and social value of the several uses of water.¹⁶

Another undesirable consequence of these uncertainties is the difficulty with which they are likely to confront governmental bodies, agencies or officers charged with the formulation and execution of statewide or regional plans for the protection and augmentation of available water supplies, the urgent need for which action has already been adverted to. In December, 1967 Governor Rockefeller announced a plan, reported to him by the New York Water Resources

Commission, which might involve the construction of 58 reservoirs adding 153,000 acres to New York's water surfaces.¹⁷ If Title II of Article 15 of the New York Conservation Law, which title is entitled "Local and Regional Water Resources Planning and Development," is applicable to this important plan,¹⁸ a knowledge of the extent and duration of New York riparian rights will be essential to the execution of the plan, since sec. 15-1107 (1) (f) of the Environmental Conservation Law provides that no plan shall include any proposal requiring action which would impair any right protected by sec. 15-1113 and since that section expressly gives protection to riparian rights.

Even in the unlikely event that Title II is construed as inapplicable to Governor Rockefeller's plan, the New York decisions that riparian rights are property rights protected by the due process clauses,¹⁹ and the virtual certainty that a plan calling for 58 reservoirs could not be executed without affecting the rights of many riparian owners to a considerable degree, make it clear that without more knowledge now available, any body, agency or officer responsible for the execution of this impressive plan would find that task more difficult than it would otherwise be. Unless New York riparian rights are more clearly defined than at present, it will be difficult for draftsmen of legislation implementing Governor Rockefeller's plan or others of a similar nature to determine what legal obstacles stand in their way; or to decide whether or not the removal of a particular obstacle would require compensation to holders of riparian rights; or, in cases requiring compensation, to estimate its probable amount.²⁰ And without such an estimate they could not accurately calculate the cost of a project upon which its feasibility would depend to an important extent.²¹

Moreover, uncertainties in the New York law of water rights might in some instances prove embarrassing to New Yorkers should they find it advisable to seek financial assistance under certain federal statutes.²² Thus the Watershed Protection and Flood Protection Act makes the acquisition of such water rights existing under state law as

may be needed to install and operate the work of improvement pre-requisite to the granting of federal funds.²³ The Small Reclamation Projects Act of 1956 contains a similar requirement;²⁴ and the water supply act of 1958 is by 43 U.S.C., sec. 390b(c) made subject to 43 U.S.C., sec. 383, which in substance requires the protection of private water rights jeopardized by reclamation projects.²⁵ Uncertainties as to New York riparian rights might well impede fulfillment of these requirements.²⁶

It should also be borne in mind that the federal water supply statute which may ultimately be enacted to implement the plan to augment the water available in the northeastern region of the United States now being prepared by the Corps of Engineers under 42 U.S.C., sec. 1962d-4 might follow the precedent established by the earlier water supply statutes known as the Reclamation Acts, and expressly provide for the recognition of state water law and for the protection of private water rights existing under it.²⁷ This possibility would appear to be strengthened by the requirement in legislation already in force that the plans shall provide for appropriate financial participation by the states, their political subdivisions and other local interests.²⁸ Should this possibility materialize, failure to have resolved existing uncertainties as to the New York law of riparian rights prior to the period during which the terms of the federal implementing legislation are being discussed, could make it difficult for New York to decide what provisions it should ask for as most important to its citizens,²⁹ and for Congress to decide to what requests it should accede.^{29a}

It was with such considerations in mind that New York began about 1950 to consider ways and means of modernizing and improving its machinery for allocating stream and lake water between competing claimants for its use, and of smoothing the path for governmental projects designed to protect and augment the state's water supplies. Speaking in broad terms, there were two obvious alternatives. One was to continue to adhere to the riparian system, relying on the

elimination by legislation³⁰ of such of its uncertainties as are actually undesirable and on such legislative revisions of its rules as could be effected compatibly with the riparian doctrine to accomplish the desired results.³¹ The other alternative was to turn to the prior appropriation system of water law; either completely by substituting it for the riparian system, or partially by superimposing all or some of the prior appropriation system on New York's existing riparian system.

The enactment in 1966 of sec. 15-0701 of the Environmental Conservation Law already adverted to which resolved a few of the vexing uncertainties then existing in the New York version of the riparian doctrine, including the one as to whether presently harmless uses of bodies of water could be held unlawful despite the waste such a holding would involve,³² indicated that New York, for the time being at least, had chosen the first of the two alternatives stated above: i.e., to continue to keep its water law within the framework of the riparian system rather than to adopt, superimpose or borrow the prior appropriation system or any of its parts. The reintroduction in 1968 at the request of the Joint Legislative Committee on the Conservation, Development and Equitable Use of the Water Resources of the State of a bill³⁴ which would, if enacted, resolve still more of the uncertainties in New York riparian law, including the one as to whether substantially harmful uses of water could be held lawful if reasonable, and would liberalize to a slight extent the New York rule in regard to the use of stream or lake water for the benefit of non-riparian land,³⁵ but without departing from the basic riparian doctrine principle that all rights in stream or lake water must have their origin in the ownership of riparian land, afforded further evidence that the New York Legislature is giving serious consideration to adherence to the first of the above alternatives. The succeeding chapters will be devoted to an attempt to demonstrate the wisdom of this choice.

Since the uncertainties which were removed from New York riparian law in 1966 and some of the uncertainties in that law which still exist are currently prevalent in some other eastern states, it is conceivable that this attempted demonstration may have relevance in such of them as realize the necessity of modernizing and improving their water law, but have not as yet made a choice between doing so by clarifying and revising their riparian law or by turning to a greater or lesser extent to the prior appropriation system.

Appreciable assistance in the demonstration of the wisdom of New York's apparent election to try to reach its goal by continuing on the riparian doctrine path is afforded by what has already been accomplished in New York through the enactment as sec. 15-0701 of the Environmental Conservation Law of what has sometimes been referred to as the Harmless Use Bill. These accomplishments are dealt with in Chapter 2.

The descriptions given above of the content of sec. 15-0701 of the Environmental Conservation Law and of the bill in regard to the legality of substantially harmful but reasonable uses of water indicate that they are quite limited in scope, each dealing with but a few of New York's water law problems. From this fact it seems safe to infer that the legislators who sponsored them prefer to bring about the needed improvement in New York water law step by step by enactment of a series of bills rather than by a single enactment constituting a complete water code. While it is difficult to make a conclusive case for this choice, several considerations tend to indicate that it was a judicious one under the conditions prevailing in New York.

Since in 1966 there was immediate need for a statute which would make it clear that New York riparian rights could be sufficiently protected without requiring waste of water,³⁶ it would have been inadvisable to run the risk of delaying the enactment of legislation accomplishing that purpose by incorporating it in a lengthy comprehensive water use act or riparian code. Because of the time which it would have taken to complete the factual studies prerequisite to satisfactory legislation in several important segments of the water law field, the preparation of such an act or code would have required several years.

Moreover, after a sound and complete act or code was drafted it might not have achieved enactment until a considerable period of time had elapsed, not only because a bill including many provisions usually finds more opponents than one with relatively few, but also because many legislators, in view of the number of bills to which they must give attention, find it difficult to become thoroughly acquainted with a long and comprehensive bill affecting law with which they are not familiar until it has been before them for several sessions. The same considerations could be advanced in support of the decision to restrict the scope of the Harmful Use Bill introduced in 1967 and reintroduced in 1968. Clarification of the New York law as to the legality of substantially harmful but reasonable alterations in or activities in connection with streams and lakes is needed now,³⁷ and should not be delayed by the inclusion of the provisions to accomplish that end in a bill covering the whole water law area. In short, it would be better to have partial improvement of New York water law relatively soon than to delay all improvement until passage of a comprehensive water use act or code could be achieved.

CHAPTER 2

ACCOMPLISHMENTS OF THE HARMLESS USE BILL EMBODIED IN SEC. 15-0701 OF THE ENVIRONMENTAL CONSERVATION LAW ENACTED IN 1966

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Prior to the enactment in 1966 of sec. 15-0701 of the Environmental Conservation Law, it had been alleged that the New York version of the riparian doctrine was one of "enforced waste."³⁸ It had been asserted in substance that since the New York law required that streams and lakes remain virtually in their natural condition,³⁹ a riparian owner who

was making no use of a stream or lake, and so would suffer no harm from another's use, could nevertheless prevent any other person, even if he were also a riparian, from using it, if his use would alter its natural condition; and that therefore the New York law required in effect that the water of its streams and lakes be unused and wasted to a considerable extent.

While the natural flow version of the riparian doctrine is vulnerable to such charges,⁴⁰ the reasonable use version of that doctrine is not, since under that version harmless alterations in streams and lakes and harmless uses of their water are not actionable.⁴¹ Because the legality of a harmless alteration under the reasonable use version would permit a riparian owner to use all of the water in a stream or lake so long as such use harmed no other riparian,⁴² no water need flow down to the sea unused in a jurisdiction adhering to that version.⁴³ The validity, then, of the complaints made against the New York riparian law as of 1965 depended in general on the extent to which the natural flow and the reasonable use versions of the riparian doctrine prevailed in New York as of that date;⁴⁴ and more specifically upon whether or not a riparian owner could obtain an injunction restraining an alteration in the natural condition of a stream or lake by withdrawals from it or by some other act, even though such alteration, if already made, was causing him no harm, or if not yet made, would cause him no immediate harm when made. As of 1965 the New York authority on these questions was divided;⁴⁵ the great majority of the court opinions which passed directly on the second and more specific question answering it in the affirmative. There are nine cases in which a New York court took the position that acts altering the natural condition of a water course or lake were wrongful and enjoined, even though the plaintiff had failed to show that he was suffering harm, or that he would immediately suffer harm if the defendant's proposed act were permitted.⁴⁶

a. Nine Cases Holding Harmless Alterations Enjoinable.

Thus in *Smith v. City of Rochester*⁴⁷ the defendant was enjoined from diverting water from Hemlock Lake for a municipal water supply at

the suit of riparian owners on Honeoye Creek into which the lake emptied, despite an agreed statement of facts which showed that the defendant was releasing water into the creek from Canadice Lake in such quantity that the plaintiffs were suffering no damage at the time of suit, but, on the contrary, had a greater and more uniform supply of water for their mills than they had enjoyed under natural conditions. The court held that the defendant was violating the plaintiffs' rights and could not escape an injunction on the ground that it had rendered the violation harmless by furnishing an adequate supply of water from another source.⁴⁸

In *Neal v. City of Rochester*⁴⁹ involving facts substantially similar to those appearing in *Smith*, the defendant was enjoined from piping water from Hemlock Creek, despite the plaintiff's failure to prove damage. After asserting that the plaintiff could not compel the city to continue the substitute supply from Canadice Lake,⁵⁰ the court concluded that an injunction was called for because the defendant's diversion of the water would, if continued, cause damage to the plaintiff in the future.

In *Townsend v. Bell*⁵¹ the defendant was enjoined from polluting a stream, although the pollution was causing the plaintiff no present harm. The court said:

"But it is urged by defendants that no actual damage to plaintiff is shown. The cases hold that this is not necessary to support an injunction in such instances. The plaintiff's right is interfered with. Unless stopped the interference may grow into a right by prescription..."

"Further, it is alleged that plaintiff's motive in purchasing the land was bad. This is immaterial. 'Courts have no power to deny to a party his legal right, because it disapproves his motives for insisting upon it.' (*Clinton v. Myers*,⁵² *ut supra*.) The plaintiff had the right to buy the land, whatever his motives were. When he became the owner he took all the rights of an owner. One of these

was to have the water of the stream unpolluted. Whether or not he uses the land now is immaterial. If he should desire to make any use of the stream requiring (as defendant's use does) pure water, he could not safely make any expenditure until he should have stopped this pollution. If he cannot prevent it, he will be unable to use the stream for any purpose requiring pure water. Therefore, it is not necessary for him to show actual damage or actual use of the stream."

N.Y. Rubber Co. v. Rothery⁵³ was an action for damages by one riparian owner against another for diverting the water of a stream in such a way that only a little of it flowed by plaintiff's land. The plaintiff requested the trial court to charge the jury that "the plaintiff's right to maintain this action and to recover a verdict for nominal damages, does not depend at all upon the plaintiff's showing any actual or perceptible damage, but solely upon the question whether the defendants have, by the use of their race, at any season of the year diverted water from Matteawan Creek, and thereby have reduced perceptibly and materially the volume or current of water which otherwise would have flowed by the plaintiff's premises." The refusal of this charge was held to be error, and the judgment in favor of the defendant was reversed. The court said:

"The plaintiff's right to recover nominal damages was substantial, though the quantity of damages was not. The defendants probably did leave water enough in the stream for the purposes of the plaintiff's business, as that business had been conducted. But the plaintiff's title to its water rights, and its right to redress for their invasion, were not conditioned upon the beneficial user of them...The plaintiff may...lose its title by the defendants' prolonged adverse user of the water of the stream, and this is the more probable if such adverse user is protected

by the verdict of the jury. It is not improbable that this action was brought to prevent the defendants from acquiring a prescriptive right to divert the water..."

Standen v. New Rochelle Water Co.⁵⁴ was an action for an injunction to restrain the defendant from diverting a watercourse, brought by a plaintiff who apparently could show no present harm from the diversion. A judgment dismissing the complaint was reversed. The court said:

"It was not competent for the defendant or the court to determine what amount of water was needed by the plaintiff, for she was entitled to the whole of it, except what was used by the defendant for ordinary purposes...The plaintiff was not limited in her use of the water by the fact that the defendant owned a larger watershed than she did. She was entitled to the beneficial use of all the water that flowed in the stream, except such as was reasonably used by the defendant...The plaintiff is not limited in her use of the water as she has been accustomed to use it, but she has a right to bring an action for the impairment of such prospective use as she might reasonably make of the water. It is perfectly plain that here was a material diversion of a stream of water which would naturally run through the plaintiff's premises. The plaintiff having established the right and shown that it was invaded, was at least entitled to nominal damages..."

In Gilzinger v. Saugerties Water Co.⁵⁵ the defendant, at the suit of a riparian mill owner, was enjoined from preventing a considerable portion of the stream from flowing past plaintiff's mill. By approving the trial court's refusal to allow the jury to decide whether or not the diversion was diminishing the supply of water necessary for the use of the plaintiff's mill, the General Term showed that it was proceeding on the assumption that proof of present harm was not essential to plaintiff's cause of action for damages and an injunction. This inference as to the court's position is supported by the following quotations from its opinion:

"If no injury did or could result to the plaintiff by this diversion, then he had no cause for complaint, and could not recover. But can it be said that the deprivation of the right to have this stream flow over his land did not, and could not injure the plaintiff's property right in the water privilege?...the rights of riparian owners do not depend on the use that they make of the water at any given time, and it does not lie with one who invades that right to say that the plaintiff has enough water left, or would have enough if he properly controlled or secured it for his uses and purposes; the right to the whole flow, whether used or not, is a right guaranteed him by law, of which he cannot be divested except by voluntary relinquishment on his part or condemnation for public purposes."

In *Amsterdam Knitting Co. v. Dean*⁵⁶ the defendant was enjoined from diverting a stream at the suit of a riparian plaintiff who could show no present harm from the diversion. The court said:

"The contention of the learned counsel for the defendants is, that upon the findings the equitable relief granted was unauthorized and erroneous as matter of law. The only basis for this proposition is, that since the referee found that there was no substantial damage to the plaintiff, there was no power in the court to direct the removal of the obstruction or the restoration of the stream to its former condition. This contention cannot be sustained. It seems to be well settled that in such cases, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, though no actual damage is shown or found."

In *Mann v. Willey*⁵⁷ a riparian owner was enjoined from polluting a stream at the suit of a lower riparian owner despite her failure to show present harm from the pollution. The court said:

"...that the discharge of such sewage into the stream does pollute and render it unfit for domestic purposes cannot be doubted, and is, we think, established by the evidence, and even though the plaintiff has not yet put the water to such a use, she had a right to the stream in its natural purity... And that right was not conditioned upon the beneficial user of it... And she was entitled to equitable relief against the defendant for interfering with it, though the damages were merely nominal."

In *Storm King Paper Co., Inc. v. Firth Carpet Co.*,⁵⁸ the defendant was enjoined from polluting a stream at the suit of a lower riparian owner, although the latter had as yet suffered no harm. In rejecting the defendant's contention that in view of this fact, it should not be enjoined, the court said:

"I find no warrant for such attitude in reason or authority. The asserted rule of perceptible, actual damage as a condition of restraint of a wrong was condemned in *Webb v. Portland Manufacturing Company*,⁵⁹ ...and this court has consistently followed the principles there stated... If an owner make such use of the water that no injury may result and no right be extinguished by prescription, the use is innocent and reasonable. But otherwise there is a wrong that may be enjoined without proof of past or present actual harm."

b. Questionable Bases of these Cases.

It will be noted that the courts based their conclusion in the above cases that an interference with the natural condition of a watercourse or lake can be unlawful and enjoined, even though such interference is not presently harming anyone, or would not immediately cause harm if and when effected, on either or both of two grounds:

(1) That unless an action can be maintained for a presently harmless interference, the person causing it can acquire a prescriptive privilege to continue the interference, even after it has become harmful; and

(2) That a riparian owner should have the ability to obtain an injunction before he has been harmed in order to forestall the possibility of future harm.

It is submitted that neither of these considerations affords justification for the results arrived at in these cases.

The assertion that an unharmed complainant must be allowed to sue in order to prevent the creation of a prescriptive privilege against him is contradicted by a well established rule of the American law of prescription: viz., that the claimant of a prescriptive privilege must not only show that his activity was continuous, notorious, and adverse to the person against whom the privilege is claimed throughout the prescriptive period, but he must also establish that his activity was wrongful so that the person against whom the privilege is claimed had a cause of action by prosecuting which he could have secured redress.⁶⁰

It follows that if a court holds a harmless interference rightful and that the complaining party has no cause of action for it, the court is, by that very act, preventing the acquisition by the interfering party of a prescriptive privilege to continue the interference.⁶¹ On the contrary, if and when the interference does cause harm, even though many years after the interference began, a party harmed by it may, if the general American rules of prescription are followed, successfully maintain a suit for damages and an injunction,⁶² provided only that he brings it within ten years⁶³ after he first suffered harm and first acquired a cause of action; for, as indicated above, the prescriptive period cannot begin to run until that time.

Also untenable is the position that a riparian owner should be able to obtain an injunction before he has been harmed in order to forestall the possibility of future harm. Maximum beneficial use and development of streams and lakes are so much in the public interest that they should certainly not only be allowed but encouraged when they involve no harm. To prevent riparian owner A from interfering with a stream because the interference would harm riparian owner B, if and when B finds use for the water, is to handicap A in order to guard against a contingency which may never occur, and to encourage B to try to extort from A a price for B's release of a riparian right which B in fact never expects to exercise.⁶⁴

So restrictive a rule is not necessary to the protection of B's possible future need for water; for it is well established that B does not lose his riparian rights and privileges by failure to exercise them,^{64a} and that the extent of A's riparian rights and privileges may contract in response to a change in conditions, such as a decision by B to begin to use the water.^{64b} Should B, however wish to make assurance doubly sure, he could, even before he had discovered any need for the water, seek an injunction restraining A from inflicting unreasonable harm in the future, or a judgment declaratory of his right to a reasonably unhampered use of the stream if and when he became ready to make it.^{64c}

Nor would the courts have provided a sound basis for injunctions against harmless alterations in bodies of water had they said that they granted them in order to protect A from himself by discouraging him from over-investment in his water-based project in the hope that B would never find use for his share of the water. If A actually did over-invest, he would find at least some offset to the consequent loss in the profit derived from having had for a time the privilege of using B's share of the water. Over-investment by A, however, is not likely to occur in New York, where knowledge of the rules that a riparian right is not lost by non-use and that the extent of a riparian right or privilege can vary when conditions change is rather widespread and would act as a powerful deterrent to over-investment.

But is it necessary to hold that a harmless alteration in a body of water is actionable in order to avoid inconsistency with the well established and salutary rule that a threatened tort which is certain to cause harm immediately if actually committed may be enjoined prior to its commission?⁶⁵ It is submitted that this question may be answered in the negative. Although it must be admitted that this rule gives B a cause of action for an injunction before he has been harmed, there would appear to be a clear distinction between a presently harmless act which might conceivably, but is not certain to become harmful under changed conditions, and an act which, because threatened, is likely to be performed and which is certain to cause harm as soon as performed. Since the harmless act already performed may never become harmful, it may properly be held lawful until it does. A threatened harmful act should, however, be held enjoinable, because of the probability

that if it is not, the threat will be carried out and harm will occur.⁶⁶ Thus in jurisdictions holding harmless alterations lawful, it is nevertheless possible to obtain an injunction against a threatened act certain to cause immediate harm if committed.⁶⁷

If it be argued that B should be able to treat A's alteration of a body of water as unlawful, even though B is not being harmed by the alteration because he has found no occasion to exercise his riparian right, just as the owner of land is able to treat intrusions upon it as unlawful, even though they are harmless to him because he is not using the land,⁶⁸ the answer is that the two cases are not as analogous as they might at first glance appear to be.⁶⁹ In the first place, land can be owned in fee simple absolute; an estate which includes the greatest aggregate of rights, privileges and powers known to the law.⁷⁰ Stream or lake water, on the other hand, is not subject to complete private ownership.⁷¹ The riparian proprietor's interest in such water being partial and limited and generally described as being merely usufructuary,⁷² can appropriately be so defined as to exclude the power to prevent a harmless use or activity by another. In the second place, the public interest in the maximum development and use of land, while undeniably great, probably has not as yet become as urgently pressing as the public interest in the maximum development and use of the water in streams and lakes. Though the distinction suggested is merely one of degree, it would appear to be a valid one. If the answer to the question as to whether harmless alterations in or uses of bodies of water should be actionable were to depend on resort to analogy, the one afforded by the rule that unsubstantial, non-trespassory interferences with the enjoyment of land are not actionable,⁷³ would appear to be closer than that afforded by the rule that trespasses are unlawful, even though harmless. Most interferences with bodies of water, like interferences with the enjoyment of land by the emission of odors or by making noise, are non-trespassory acts.⁷⁴

c. One Case Holding Harmless Alteration Lawful.

In *Knauth v. Erie Rr. Co.*⁷⁵ it was held that a harmless use of stream water, even if on non-riparian land, was not actionable and therefore could not begin to serve as a foundation for a prescriptive privilege until it had become harmful. It will be noted that the court accepted and applied the correct version of the American doctrine of

prescription,⁷⁶ and so arrived at a result contrary to that reached in the nine other New York cases passing on the legality of harmless alterations in bodies of water.⁷⁷ Thus as of 1965 there was, as previously stated,⁷⁸ a division of New York authority as to the legality of a presently harmless interference, which might become harmful in the future.

d. Cases Inconsistent with the Natural Flow Doctrine.

In *Bullard v. Saratoga Victory Mfg. Co.*⁷⁹ and in *Pierson v. Speyer*,⁸⁰ each decided prior to 1965, it was held that a defendant's withdrawal of water from a stream or lake or an interference with the natural condition of such bodies of water is lawful, if reasonable under all the circumstances, even though the alteration in the natural condition of the body of water caused by the withdrawal or interference is substantial and harmful to the plaintiff. There appears to be a basic inconsistency between the view taken in these two cases and that expressed in the nine others previously referred to that any alteration in the natural condition of a body of water is enjoinable though harmless. The view taken in *Bullard* and *Pierson* is in conformity with the reasonable use version of the riparian doctrine,⁸¹ whereas that taken in the nine cases is in conformity with the natural flow version of that doctrine.⁸² Moreover, it is not easy to reconcile a refusal to enjoin a harmful alteration in one case with the award of an injunction against a harmless alteration in another. It would seem, therefore, that *Bullard* and *Pierson* could properly be included in a list of cases tending to support the position that in New York a harmless water-connected activity is lawful for so long as it is harmless, even though neither of the opinions in these cases contains an express statement to that effect.⁸³

e. Bearing of *McCann v. Chasm Power Co.*

Though *McCann v. Chasm Power Co.*⁸⁴ has been cited as supporting the proposition that under New York common law proof of damage was essential to the maintenance of an action by a riparian owner against a party making use of a stream,⁸⁵ it seems clear that the case does not

do so. It appeared in McCann that the defendant power company built a dam which backed up a stream in a canyon on plaintiffs' land through which the stream ran; that in consequence parts of the canyon walls which were above the level of the stream before the dam was erected, were submerged; that the amount of power which plaintiffs could derive from the stream, if they ever decided to use it, was diminished; that as the plaintiffs were not using the stream nor planning to do so, they had suffered no damage; that plaintiffs sought an injunction restraining the defendant from flooding the canyon walls; that the trial court granted the injunction; and that the appellate division suspended the present operation of the injunction, but included in its judgment a provision that the plaintiffs, if later able to show substantial damage, might apply for reinstatement of the injunction. In affirming this judgment the Court of Appeals said *inter alia*:

"The plaintiffs as riparian owners had the strict legal right to have the natural fall in the river...uninterfered with. The defendant in raising the water committed a trespass upon the lands of the plaintiffs. Such trespass was continued from the time the dam was constructed to the entry of the judgment and the defendant was legally liable to continuous actions at law... The trespass being continuous, the plaintiffs had the right to resort to equity for the purpose of enjoining its continuance and to thus prevent a multiplicity of actions at law..."⁸⁶

The court then proceeded to defend the suspension of the injunction on two grounds: (1) that equity will not grant an injunction when it will do the plaintiff little good and cause great public or private hardship;⁸⁷ and (2) that the appellate division judgment, by declaring the plaintiffs' title and their opportunity to vindicate it, adequately protected them from the acquisition by defendant of a prescriptive privilege.⁸⁸

It will be noted that the plaintiffs were not denied immediate enforcement of the injunction on the theory that the presently harmless

interference with the natural condition of the stream was not wrongful; that is, on the theory that proof of damage was essential to the establishment of a violation of a riparian right. On the contrary, the Court of Appeals characterized the defendant's act as wrongful when it said that defendant was guilty of trespass and liable to repeated actions at law; and founded its approval of the suspension of the injunction on the doctrine of balancing hardships or interests⁸⁹ rather than on the legality of defendant's alteration of the condition of the stream.⁹⁰ Thus the basic theory of McCann conflicts not at all with the doctrines on which the cases enjoining harmless alterations were founded.

It must be admitted, however, that McCann does not lay down an unqualified rule that all kinds of interferences with the natural condition of a body of water, whether trespassory or not, can be unlawful though harmless, and cannot, therefore, be cited as reaffirming the doctrine of the cases enjoining harmless alterations. It will be borne in mind that the alteration of the stream involved in McCann, unlike most interferences with streams, was trespassory in nature, causing a rise in the height of the water in the canyon, and the casting of water upon parts of the plaintiffs' canyon walls which had formerly been dry.⁹¹ So, because of the well established general rule that an intrusion on the land of another without his consent is wrongful and a trespass, even though causing no harm,⁹² the court's conclusion in McCann that defendant's interference with the natural condition of the stream was wrongful, though harmless, was not only easy to reach but was scarcely avoidable.

But it is just as clear, on the other hand, as already indicated, that McCann cannot be cited as holding that proof of damage is essential to a recovery for all kinds of interferences with the natural condition of a stream. The holding was that defendant's interference, though presently harmless, was a wrongful trespass. The question as to whether a non-trespassory interference by the defendant would have been wrongful, if harmless, was not before the court, because no interference of this type had occurred; and the court expressed no opinion in regard to that question.⁹³

f. Bearing of Fulton County Gas & Electric Co. v. Rockwood Mfg. Co.

In Fulton⁹⁴ a lower riparian owner sought an injunction against the maintenance of a dam by an upper riparian owner. Two significant facts appeared: (1) that the plaintiff had not been harmed by the dam because he was not using the stream; and (2) that "the natural flow of the stream was 100 cubic feet per second or 150 cubic feet per second and that this had not been interfered with" by the dam.⁹⁵ If the court had wished to overrule the nine cases⁹⁶ taking the position that harmless alterations are enjoinable it could have based its denial of an injunction on the first fact. It elected, however, to base such denial on the second fact: viz., that the dam had caused no alteration in the stream flow. The decision in Fulton therefore created no obstacle to future holdings by the New York courts that alteration of a body of water is unlawful, even though the lower riparian owners are suffering no harm from such an alteration at the time they seek to enjoin it.

g. Need for Remedial Legislation in New York.

It would seem that the New York cases referred to in this section clearly justify the statement already made⁹⁷ that as of 1965 there was a division of authority as to whether the natural flow version or the reasonable use version of the riparian doctrine prevailed in New York, and as to whether or not a riparian owner could in New York obtain an injunction restraining an alteration in the natural condition of a body of water by withdrawals from it or by some other act, even though such alteration, is already made, was causing him no harm, or if not yet effected, would cause him no immediate harm when effected. It follows that it was uncertain as of 1965 whether or not the New York version of the riparian doctrine was one of "enforced waste" as charged.⁹⁸ Granted that the New York cases following the reasonable use version by holding that a harmful alteration would be lawful if reasonable and the decision in Knauth that an alteration would not be actionable

unless harmful, took the obviously better position,⁹⁹ the decisions empowering a riparian to enjoin a harmless alteration, some of which were rendered by the Court of Appeals,¹⁰⁰ were numerous and had never been reversed.¹⁰¹ Moreover, neither the opinion in Knauth nor any of the opinions in the cases holding that harmful alterations are lawful if reasonable made any attempt to explain the relation between their holdings and the cases in which injunctions against harmless alterations had been granted. It was therefore by no means certain as of 1965 that the New York courts would refuse to enjoin a harmless alteration if a riparian plaintiff requested such relief.¹⁰² Under these conditions legislation was urgently needed to make it certain that there would be no more court decisions requiring waste of water; to afford guidance and encouragement to riparian owners contemplating embarkation upon water-connected projects which, while harmless to other riparians, would involve alterations in the natural condition of a body of water; and to supply information to agencies or officials charged with the formulation and execution of public projects for the protection and augmentation of the water resources of the state.

Sec. 2. The Uncertainty as of 1965 as to when it was Necessary to Bring Precautionary Suits to Prevent the Loss of Riparian Rights by Prescription

It will be remembered that the conclusion reached in nine New York cases that acts altering the natural condition of a body of water were wrongful and enjoined, even though the plaintiff had failed to show that he was suffering harm or that he would immediately suffer harm if the defendant's proposed act were permitted, was based in part on the view that such relief was necessary to the protection of the plaintiff against the acquisition of a prescriptive privilege by the defendant.¹⁰³ It will also be remembered, however, that this view was unsound because in conflict with a basic principle of the American law of prescription;¹⁰⁴ and that there was one New York decision contrary to it.¹⁰⁵ There was therefore as of 1965 uncertainty in New York as to whether or not a prudent riparian owner should bring a

precautionary suit against any person effecting an alteration in a body of water to which the prudent owner's land was riparian, even though the alteration was at the time harmless to him, in order to protect himself against the possibility that if the alteration should ultimately become harmful to him, and to an unreasonable extent, his action on account of such harm could be defeated by a claim of prescriptive privilege.¹⁰⁶ Whether the next New York court to face the question would follow the erroneous view entertained by the weight of New York authority, or the correct view directly supported by but one New York case, was as of 1965 a speculative matter.

Sec. 3. Text of Sec. 15-0701 of the Environmental Conservation Law

One of the most important purposes of the Harmless Use Bill, recommended by the Cornell Water Resources and Marine Sciences Center, sponsored by the New York Temporary State Commission on Water Resources Planning, enacted by the New York Legislature in 1966 as sec. 429-j of the Conservation Law and re-enacted as sec. 15-0701 of the Environmental Conservation Law was the elimination of the uncertainties in New York riparian law hereinbefore described in secs. 1 and 2. Sec. 15-0701 reads as follows:

Harmless alterations in watercourses and lakes; prescriptive rights or privileges; action for declaratory judgment; limitations of time.

(1) An alteration (whether or not it causes water to cover or permeate land previously dry) in the natural flow, quantity, quality or condition of a natural watercourse or lake situated in this state and either on or below the surface of the earth, effected by the use either on or off riparian land, withdrawal, impoundment, or obstruction of the water in such watercourse or lake, or by the addition of water thereto, or by changes in the banks, bed, course or other physical characteristics of such watercourse or lake, is reasonable and lawful as against any person, as defined in subdivision two of section four hundred three of the conservation law, having

an interest in such watercourse or lake, unless such alteration is causing harm to him or it, or would cause him or it immediate harm if and when begun. No action for nominal damages or for an injunction shall be maintainable because of such an alteration against any person or corporation, whether a riparian owner or not, on the ground that such alteration is an infringement of the plaintiff's private rights and privileges in the waters of, or with respect to, such watercourse or lake, unless such alteration is causing plaintiff harm, or would cause him or it immediate harm if and when begun. This subdivision shall apply to such an action regardless of whether the alteration sought to be made the basis of it was caused before or after the effective date of this section.

(2) For the purpose of this section, "harm" shall mean (a) interference with a present use of the water by the complaining party or an interference with the complaining party's present enjoyment of riparian land occurring prior to suit, or which will immediately occur when the alteration complained of is begun, regardless of whether such interference has caused or will ever cause such party measurable financial loss; or (b) a decrease in the market value of the complaining party's interest in riparian land occurring prior to suit, or which will immediately occur when the alteration complained of is begun, regardless of whether his use of the water or enjoyment of riparian land was interfered with prior to suit, or will be immediately interfered with when the alteration complained of is begun.

Interference with the present enjoyment of riparian land may be established by proof that the alteration complained of or sought to be enjoined is rendering or will immediately render riparian land owned or occupied by the complainant less suitable or useful for

the purpose or purposes to which he is presently devoting it. The evidence admissible to establish a decrease in the suitability or utility of such land for such purposes may include, but not be limited to, evidence tending to show that the act complained of has diminished, or when begun, will immediately diminish, the desirability for recreational purposes, or the natural beauty of the body of water to which the land owned or occupied by the complainant is riparian.

(3) The cause of action essential to the initiation and creation of a prescriptive right or privilege against a private riparian owner to continue an alteration in the natural condition of such a watercourse or lake shall not be supplied by such an alteration until it shall have caused such riparian owner harm and then only if it is unreasonable.

(4) Nothing contained in this section shall, however, be construed as depriving any person or corporation having an interest in such watercourse or lake of any remedy either at law or in equity which he now has, or may hereafter acquire, under the law of this state for harm caused him by an unreasonable alteration in the natural condition of such a watercourse or lake, regardless of whether such alteration was harmful and unreasonable from its initiation or subsequently became so.

(5) Any person desirous of ascertaining the extent of the rights and privileges of himself and others in the water of or with respect to the natural condition of such a natural watercourse or lake may maintain an action for a declaratory judgment defining the extent of such rights and privileges. Neither proof of present harm nor of the likelihood of future harm to the plaintiff from an alteration in the natural condition of such watercourse or lake shall be pre-

requisite to the maintenance of such an action, the judgment in which shall not affect the rights and privileges of any person or corporation not a party thereto. Such an action shall be maintainable by persons, corporations, governmental units, owners of land riparian to such a natural watercourse or lake, persons to whom such owners have granted their riparian rights in whole or in part, and owners of prescriptive rights or privileges in the water of or with respect to such watercourses or lakes.

(6) No statute of limitations shall begin to run against a cause of action for such a declaratory judgment until a plaintiff who is empowered by this section to maintain it has been harmed by an unreasonable alteration in the natural condition of such watercourse or lake effected by the person or his predecessor in interest against whom such an action may be maintained.

(7) Notwithstanding any other provision of this section, if the harm resulting from an unreasonable alteration of the natural condition of such a natural watercourse or lake is one which would not ordinarily be noticeable by an owner of land actually present thereon, no statute of limitations shall begin to run against any cause of action referred to in subdivisions four and five of this section until the party harmed is fairly chargeable with knowledge that he has been harmed.

(8) Nothing herein contained shall be construed to alter or affect the right to exercise any power which the state of New York or any agency thereof, or any county, city, town or village or any agency thereof, may have to enjoin the initiation or continuance of an alteration in the natural condition of a natural watercourse or lake.

§ 2. This act shall take effect October first, nineteen hundred sixty-six.

Sec. 4. Benefits Achieved by Elimination by Sec. 15-0701 of the Environmental Conservation Law of Uncertainties Described in Secs. 1 and 2¹⁰⁷

- a. The Uncertainty as of 1965 as to Whether the New York Version of the Riparian Doctrine was One of Enforced Waste. 27
- b. The Uncertainty as of 1965 as to when it was Necessary to Bring Precautionary Suits to Prevent the Loss of Riparian Rights by Prescription. 30
 - a. The Uncertainty as of 1965 as to whether the New York Version of the Riparian Doctrine was One of Enforced Waste.

One of the most important beneficial effects of the enactment of sec. 15-0701 of the Environmental Conservation Law was the elimination of the possibility that a private riparian owner in New York could compel the waste of stream or lake water by enjoining a use of such water or an activity in connection with it, even though he was not being harmed by such use or activity, merely by showing that such use or activity altered the natural condition of the stream or lake.¹⁰⁸ In other words the provisions of subd. (1) of sec. 15-0701¹⁰⁹ to the effect that an alteration in the natural condition of a body of water, however effected, is reasonable and lawful, unless and until it is harmful, make it clear that one of the basic rules of the reasonable use version of the riparian doctrine - that a harmless use of water cannot be illegal¹¹⁰ - is currently prevalent in New York; at least as against private persons.¹¹¹

The practical importance of a rule preventing a private party from enjoining a harmless alteration of the natural condition of a body of water would be clear in the following or similar situations. Suppose that a riparian industry needed more water than it could reasonably and lawfully take from the lake on which it was situated; that an additional supply from another source could be obtained by purchase; and that this additional supply could be transported to the lake by emptying it into a stream tributary to it without causing harm

to any riparian owner on the stream or on the lake. Prior to the enactment of sec. 15-0701 the nine cases taking the position that alterations in the natural condition of a body of water could be enjoined though harmless,¹¹² and the dicta to the effect that the addition of foreign water¹¹³ to a stream or lake was unlawful, uttered without any intimation that such an addition would be legal if harmless,¹¹⁴ made it conceivable that the riparian owners on the stream and the riparian owners on the lake, other than the industry seeking additional water, could enjoin the addition to the stream and lake of the purchased foreign water, even though they would not be harmed by such addition and even though the industry badly needed the foreign water. Under subd. (1) of sec. 15-0701, however, the proposed operation would be entirely lawful for so long as it caused no harm, even though the addition of the foreign water caused minor flooding¹¹⁵ of the lands of other riparians, and though the added water flowed or stood over privately owned stream or lake bed.

Or suppose that U and L are respectively upper and lower riparian owners on stream A; that U is the owner of all the land riparian to lake B which contains water of as good quality as that flowing in stream A, but is not tributary to that stream; that U can use water from stream A more advantageously than he can use water from lake B, but that if he satisfies all his water needs from stream A, the supply of water available in that stream for L's use will be cut down to an unreasonable extent; that U can, however, take all the water he needs from stream A without causing L harm if U replaces the water he takes from stream A by emptying water from lake B into stream A at a point above L's riparian land; and that U is willing to make good his withdrawals from stream A in this manner if they are held to be permissible. If the question as to the legality of such procedure had arisen in 1965, it might have been held, in view of the two New York Court of Appeals decisions which might still have had the force of law at that time,¹¹⁶ that L could have enjoined U's withdrawals, despite the fact that the substitution of the lake water would render them harmless to L. Should such a question arise now, it would seem clear that U could carry out his

project without creating in L a cause of action for injunctive relief, unless U at some future date failed to supply enough substitute water of a satisfactory quality, since subd. (1) of sec. 15-0701 expressly authorizes both harmless withdrawals from and harmless additions to the waters of a stream or lake.¹¹⁷

In other words, sec. 15-0701 legalizes the resort to harmless "physical solutions" of water problems in accordance with the practice which has long prevailed in California and has become even more prevalent there since California's adoption in 1928 of a rule concerning the use of stream and lake water which resembles to a substantial degree that embodied in sec. 15-0701.¹¹⁸ Concerning these physical solutions a learned writer has recently said:

"The right of an appropriator or riparian owner to receive his water supply in the quantity and quality and at the times nature provides is a property right, of which he may not be deprived arbitrarily. However, to supply him at his place of use an equivalent quantity of water of the same quality and during the same period of use, at no greater expense to him than he has been incurring, is not to deprive him of any part of his property right. The courts have authority to accept physical solutions agreed to by the parties to water controversies, and to impose physical solutions upon them if they cannot agree, provided that the superior or prior rights are fully protected. The purpose of physical solutions is to avoid unnecessary and unconscionable waste of water and at the same time protect existing rights of use."¹¹⁹

Or again, suppose that a watershed district formed under article 5-D of the New York County Law and thereby designated as a local organization authorized to apply for federal financial assistance in executing a district project under the federal Watershed Protection and Flood Prevention Act,¹²⁰ proposed to construct a dam in a stream to collect water during rainy seasons for release in dry seasons for the purpose

of stabilizing the stream flow, and that the physical conditions in the watershed were such that stabilization accomplished in this manner could not conceivably be harmful to any riparian owner located more than 25 miles below the dam.¹²¹ Prior to the enactment of sec. 15-0701 the cases taking the position that alterations in the natural condition of a body of water could be enjoined though harmless,¹²² and the cases which might possibly be interpreted as casting doubt on the legality of harmless seasonal impoundment of water, as distinguished from short-term impoundment for the creation of water power,¹²³ made it conceivable that the watershed district would have to negotiate with respect to riparian rights not only with the riparian owners located within 25 miles of the dam, but also with those situated more than 25 miles away, including those as distant from the dam as the mouth of the stream. Under sec. 15-0701, however, the watershed district would have to come to terms only with such of those riparians within 25 miles of the dam as might possibly be adversely affected by stabilization of the stream flow. In short, sec. 15-0701 would diminish the complexity and cost of the project.

b. The Uncertainty as of 1965 as to when it was Necessary to Bring Precautionary Suits to Prevent the Loss of Riparian Rights by Prescription.

The uncertainty as to whether B would be in danger of losing part or whole of his riparian rights and privileges if he failed to bring an action against A based on a harmless alteration in a body of water effected by A¹²⁴ was clearly resolved in B's favor by subd. (3)¹²⁵ of sec. 15-0701 of the Environmental Conservation Law providing in substance that prescription will not begin to run against B until he has suffered harm. It is clear that beneficial consequences follow the resolution of this uncertainty in conformity with the principle that no harmless alteration can be actionable which is a basic component of the reasonable use version of the riparian doctrine.¹²⁶ Prior to the enactment of sec. 15-0701 the situation was this. If when A effected his harmless alteration, B were aware of the possibility that

his riparian interest might be impaired if he did not sue A because of the harmless alteration, B would probably feel constrained to bring an action to the expense of which he as an unharmed riparian ought not to be put, and with which the courts ought not to be burdened. And if he obtained judgment restraining A's harmless alteration, a waste of water would normally result.¹²⁷ On the other hand, if B were ignorant of the technical doctrines creating the uncertainty, as he well might be, he probably would not sue A; but if he did not, he might subsequently find that his riparian interest had been cut down by prescription.¹²⁸ Under subd. (3) of sec. 15-0701, however, B is relieved of the burden of suing when he is not harmed, and is subject to risk of loss of his riparian rights and privileges only when he fails to sue despite the warning of the possibility of such loss given him by an activity of A's which is causing him harm. Moreover, subd. (3) furthers the public interests in preventing waste of water and in reducing the amount of litigation whenever a reduction can be effected without hindering the protection of substantial rights.

Sec. 5. Miscellaneous Beneficial Effects of Sec. 15-0701.

- a. Elimination of the Uncertainty as to the Legality of Harmless Non-riparian Uses. 31
- b. Express Authorization of Actions for Judgments Declaratory of Riparian Rights: Running of Statute of Limitations Delayed Until Plaintiff has Suffered Actionable Harm. 33
- c. Protection of Riparian Rights against Unknown Infringement. 39
 - a. Elimination of the Uncertainty as to the Legality of Harmless Non-riparian Uses.

In *Smith v. City of Rochester* and *Neal v. City of Rochester* it was held that an alteration in the natural condition of a stream or lake effected to obtain water for municipal supply was enjoinable though causing the plaintiff riparian owner no harm.¹²⁹ Inasmuch as use for municipal supply is in most jurisdictions classified as a non-riparian use,¹³⁰ and as there appears to be no New York case to the contrary,¹³¹

it would seem that Smith and Neal stand for the proposition that non-riparian uses are unlawful, even though harmless. If this interpretation of Smith and Neal be correct,¹³² there was as of 1965 a division of New York authority and consequent uncertainty as to the legality of harmless non-riparian uses; for in *Knauth v. Erie Rr. Co.* it was held without discussion, and even without citation of Smith and Neal, that a harmless use of stream water on non-riparian land was not actionable, and so could not initiate the creation of a prescriptive privilege.¹³³

This uncertainty was definitely resolved in favor of the legality of harmless non-riparian uses by the provision in subd. (1) of sec. 15-0701 that an alteration in a body of water is reasonable and lawful unless harmful, even when effected by use of the water on non-riparian land.¹³⁴ Inasmuch as a common criticism of the riparian system is that in most states in which it prevails, it restricts the use of stream or lake water for the benefit of non-riparian land to too great an extent,¹³⁵ sec. 15-0701, by legalizing harmless non-riparian uses, took a small but significant step in the right direction, and one which puts New York in accord with the view prevailing in a plurality of the states which have passed on the legality of harmless non-riparian uses.¹³⁶ Justification for this view is afforded by the advantages which both riparian owners and the public at large might derive from adherence to it.¹³⁷ If a riparian owner for some reason cannot himself exercise his riparian privileges, his chance of selling them on favorable terms will be greater if the number of potential buyers is increased by the admission to that group of non-riparians who could expect to make a profit from the exercise of riparian privileges, even if they were restricted to activities which would be harmless to riparian owners other than the one from whom they obtained such privileges. And it is clear, of course, that under some circumstances, non-riparian uses would better serve the public interest than would riparian uses.¹³⁸

b. Express Authorization of Actions for Judgments Declaratory of Riparian Rights: Running of Statute of Limitations Delayed until Plaintiff has Suffered Actionable Harm.

Subd. (5) of sec. 15-0701 of the Environmental Conservation Law authorizes any person desirous of ascertaining the extent of the rights and privileges of himself and others in a body of water to maintain an action for a judgment declaratory thereof.¹³⁹ The effect of this authorization should be beneficial. Even though an unharmed riparian owner is properly prevented by subd. (1) of the section¹⁴⁰ from obtaining an injunction or nominal damages, he,¹⁴¹ as well as one considering embarkation on a water-connected project, should be able, if he wishes, to secure an adjudication of the extent of the rights and privileges of himself and of others interested in the stream or lake.¹⁴² While it is true that the riparian doctrine principle of variability - that the extent of the rights and privileges of riparian owners on a body of water can vary with changing circumstances¹⁴³ - would prevent a court from granting a declaratory judgment which purported to determine the exact extent of the rights and privileges of the parties in perpetuity,¹⁴⁴ it does not follow that a judgment so formulated as to respect this principle would have no practical value. A judgment declaring that an alteration effected or proposed by A was lawful at the date of the judgment, but that A might have to curtail his activities if and when B became ready to use his share of the water would clearly put both parties in a better position than they would have been in if no judgment at all had been rendered. And the value of such a judgment to both parties could be materially increased if the court were authorized by statute to provide in its judgment that the rights and privileges declared therein as existing in A should endure for a specified time, but not in excess of the maximum period prescribed in the statute.¹⁴⁵

Although it is conceivable that an action for a declaratory judgment as to water rights was maintainable prior to the enactment of sec. 15-0701 under sec. 3001 of the New York Civil Practice Law and Rules, which provides for the maintenance of actions for declaratory

judgments without limitation as to subject matter, and while it is therefore possible that the express authorization of such an action by subd. (5) was not actually necessary, the enactment of subd. (5) serves to dispel whatever doubt there might be as to the maintainability of the action, and decreases the risk that such maintainability might be overlooked by attorneys for persons whose interests might be served by the institution of an action for a judgment declarative of their riparian rights and privileges.^{145a}

While it is well settled that the success of a defendant's plea of the statute of limitations will depend primarily on the date of the accrual of the plaintiff's cause of action and on whether or not the plaintiff began suit after such accrual within the number of years specified in the statute of limitations applicable to his cause of action,¹⁴⁶ and while such little New York authority as there is on the question as to when a cause of action to obtain a declaratory judgment accrues is to the effect that it arises when the plaintiff becomes aware that an actual controversy exists between him and the defendant,¹⁴⁷ there was doubt under the New York law in force prior to the enactment of sec. 15-0701 of the Environmental Conservation Law as to what statute, if any, fixed the time within which an accrued cause of action for a declaratory judgment must be sued upon.

Thus there was authority for each of the following propositions: (1) "that there is no statutory limitation upon the bringing of such an action...";¹⁴⁸ (2) that when in declaratory judgment action additional relief is sought, such as a money recovery, the statute of limitations applicable to the additional relief applies also to the action for a declaratory judgment;¹⁴⁹ and (3) that since New York has no statute of limitations expressly applicable to actions for declaratory judgments, such an action is governed by CPLR, sec. 213, subd. 1, which provides that an action for which no limitation is specifically prescribed by law must be commenced within six years.¹⁵⁰ Granting that either the first or third of these propositions can be reconciled with the second on the ground that when relief in addition to a declaratory judgment is asked, an exception should be made to either of these

general rules, it would seem difficult to reconcile the first and third propositions with each other, unless the first, contrary to its literal purport, were taken to mean merely that New York had no statute of limitations which was in specific terms made applicable to an action for a declaratory judgment. In view of this situation, if B were in controversy with A over their respective riparian rights and privileges as to a particular body of water, neither could be sure under the New York law as of 1965 as to how long a time B would have, after being wrongfully harmed by A, to bring an action for a declaration as to such rights and privileges.

By providing that no statute of limitations should begin to run against a cause of action for a judgment declaratory of riparian rights and privileges until the prospective plaintiff has been harmed by an unreasonable alteration in the natural condition of the body of water in which he has an interest, subd. (6) of sec. 15-0701¹⁵¹ has, as far as declaratory judgments in regard to water rights are concerned, changed the rule that the statute of limitations begins to run against a party when his cause of action accrues; and so preserves a riparian owner's cause of action for a declaration as to riparian rights and privileges indefinitely, if he is never harmed by an unreasonable alteration in the natural condition of the body of water involved. Thus the combined effect of subds. (5) and (6) is to create a situation in which a riparian owner can acquire a cause of action for a declaratory judgment as to his riparian interests without setting a statute of limitations in motion against it until he acquires an additional cause of action for harm resulting from an unreasonable interference with a stream or lake. It has been held that such a situation is not necessarily anomalous;¹⁵² and it would seem on the whole to be desirable to permit a riparian owner to have the advantage of it. In this instance no more than in others¹⁵³ should a riparian owner be put in a position in which he must either sue without having been wrongfully harmed or suffer the loss of his power to sue. Since under some circumstances delay in seeking a declaratory judgment would be advantageous

to a riparian owner hopeful that the controversy could be composed without the expense of litigation, and would not be prejudicial to his fellow riparians, he should have the option of postponing suit for a declaratory judgment until an actual infringement of his riparian rights gives him warning that the controversy existing between him and his riparian neighbors is indeed a serious one. Even in a case in which delay would be disadvantageous to the other riparians, the possession of the option just described by any prospective riparian plaintiff need not prejudice them; for they could prevent any delay from their point of view by themselves bringing suit for a declaratory judgment pursuant to subd. (5).¹⁵⁴

But if subd. (6) can be commended for giving a riparian owner the option discussed above, it might be criticized for its failure to provide an answer to the question as to within how many years after he has been harmed by an unreasonable alteration in a body of water he must begin his action for a declaratory judgment or be barred from such relief by lapse of time; a question which is the counterpart of the one existing in New York with respect to actions for declaratory judgments concerning interests other than water rights, and to which, as pointed out above, three different answers have been made.¹⁵⁵ Which of these three the courts would give in an action for a judgment declarative of riparian rights and privileges appears to be a speculative matter.

The answer that there is no statute of limitations applicable to actions for declaratory judgments probably would be rejected in any case arising now if it were given more careful consideration than was accorded to it in the two cases which arrived at it in the past.¹⁵⁶ This answer is contrary to the public interest in the quieting of controversies within a reasonable time, and is apparently in conflict with the statute providing that an action for which no limitation is specifically prescribed by law must be commenced within six years.

But the question remains as to whether a riparian owner will have three or six years in which to seek a declaration of his riparian rights and privileges after he has been harmed by an unreasonable

alteration in a body of water. Arguments could be made in support of either conclusion. In favor of the three-year alternative it could be pointed out that under CPLR sec. 214, applicable to actions for injury to property, a riparian owner would have only three years in which to sue for wrongfully inflicted harm; and that there is no sound reason why a riparian owner should not be required to seek what declaratory relief he wants within the three years allowed him to sue for damages. Having been actually harmed, he is warned that he is involved in a serious controversy. Moreover, CPLR 3001 seems to authorize¹⁵⁷ and has been treated as authorizing a plaintiff to seek damages and declaratory relief in one action.¹⁵⁸

In favor of the six-year alternative it can be argued that there might be circumstances under which a riparian owner would prefer, if he would not be penalized for such an election, to sue for damages within three years of the infliction of wrongful harm upon him, but to wait three years more before suing for a declaration of his riparian rights. Thus B might well entertain such a preference if A has harmed him by unreasonably but only temporarily polluting a stream; if A is taking X gallons of water from it per day without harming B, but is claiming that if he wishes to do so he is entitled to take 2X gallons per day, an amount which might be held to be unreasonable in view of all the facts. There would seem to be no particularly cogent reason why B should have to seek a judgment declaring that A's withdrawal of 2X gallons per day would be unreasonable before B's action for the wrongful pollution had been barred by the three-year statute of limitations applicable to actions for injuries to property.¹⁵⁹ It could also be argued in favor of the six-year alternative that this is the period expressly set by CPLR, sec. 213, subd. 1 for actions for which no other statute of limitations is specifically provided, and that the courts should not ignore the statute in the absence of the most compelling reasons for so doing.

Since arguments of some substance can be made in support of both the three-year and the six-year alternative, it would seem advisable to amend subd. (6)¹⁶⁰ of sec. 15-0701 by adding provisions clarifying

the law as to within how many years after a riparian owner has been wrongfully harmed he must bring his action for a declaratory judgment if he wishes to obtain one. It seems likely, however, that in many instances the question as to the time within which an action must be brought for a declaration of riparian rights and privileges after the prospective plaintiff has acquired a cause of action for damages would be of little practical importance. If a controversy arises in 1968 between A and B with respect to their riparian interests, and if A inflicts harm upon B by an unreasonable alteration of the body of water to which their lands are riparian, it will not matter to B whether the statute of limitations begins running against his declaratory judgment cause of action three or six years after the accrual of his cause of action for damages, unless the conditions and circumstances by consideration of which the reasonableness of any particular riparian activity is determined remain substantially unchanged. For if they do change substantially and a controversy arises thereafter between A and B as to their respective rights and privileges in the new situation, a new cause of action for a declaratory judgment would have accrued to B because of the riparian doctrine of variability pursuant to which the extent of riparian rights and privileges can vary in response to changed conditions.¹⁶¹ And this new cause of action would not be affected in any way by the extinguishment by the statute of limitations of B's original cause of action for a judgment declarative of his and A's riparian rights and privileges under the earlier conditions and circumstances. In view of the changes in the physical condition of and demands upon New York streams and lakes which are now occurring at an accelerating pace, and of the relevance of such conditions and demands to the legality of alterations in a body of water, it seems likely that in many cases B would not suffer much disadvantage from a speedy extinguishment of his first cause of action for a declaratory judgment, because he would probably acquire a new one within a relatively short time.

c. Protection of Riparian Rights against Unknown Infringement.

Another benefit is conferred upon riparian owners by subd. (7) of sec. 15-0701 of the Environmental Conservation Law which provides that if harm resulting from an unreasonable alteration of a body of water would not ordinarily be noticed by an owner of land actually present thereon, no statute of limitations shall begin to run against any cause of action referred to in the section until the party harmed is fairly chargeable with knowledge that he has been harmed.¹⁶³

Because it was the law of New York in 1965, and still is, except when subd. (7) would be applicable, that the statute of limitations begins to run against a cause of action, including one for injury to property, when the harm is inflicted, even though the plaintiff is unaware that he has been harmed,¹⁶⁴ it would be possible for a defendant to escape liability for a violation of riparian rights in certain instances, although the plaintiff had not had a reasonable opportunity to protect himself by suit, if subd. (7) had not been included in sec. 15-0701.

For example suppose that U and L are respectively upper and lower riparian owners on a stream; that in 1968 U begins to discharge into the stream a colorless and odorless effluent from his industrial plant which is carried imperceptibly into the sub-soil of L's riparian tract by lateral permeation from the stream;¹⁶⁵ that this pollution of L's land continues until 1978 without attracting his notice, since it did not interfere with any use he was making of his land from 1968 to 1978; that L discovered the pollution in 1978 when P, a prospective purchaser of L's land, made test borings to ascertain its suitability for his purposes; that because of the pollution of L's land its market value was decreased; that the consequences of the pollution on L's land are irremediable, became so in 1971, and will continue to be so indefinitely even though U stops the discharge of effluent into the stream. If L sues U in 1978 on the ground that U caused L harm by an unreasonable alteration of the natural condition of the stream, it is conceivable that except for subd. (7), U could successfully plead the three year statute of limitations applicable

to injuries to property¹⁶⁶ on the theory that L's cause of action for the harm to his land accrued not later than 1971, and was therefore barred by the three year statute, despite L's ignorance of the harm. It would seem that the New York Legislature acted wisely in protecting owners of riparian land from a hazard of this sort by the enactment of subd. (7).¹⁶⁷

Sec. 6. Inapplicability of Subd. (1) of Sec. 15-0701 of the Environmental Conservation Law to the State and to Local Governmental Units.

It is clear that the legislature intended that the state and its agencies and local governmental units and their agencies, when appearing in the role of plaintiff, should not be deprived by the provisions of subd. (1) of sec. 15-0701 legalizing harmless alterations in the natural condition of bodies of water of any power which they may have had at common law to enjoin harmless alterations in the natural condition of streams and lakes. This intent is twice clearly manifested: First by the provision in subd. (1)¹⁶⁸ that a harmless alteration shall be reasonable and lawful as against any person as defined in subd. (2) of sec. 15-0701 of the Environmental Conservation Law, which definition excludes the state and the other governmental entities mentioned above;¹⁶⁹ and second by subd. (8) of sec. 15-0701¹⁷⁰ which provides that nothing in the section shall be construed to affect any power which the state or the other governmental entities mentioned above may have to enjoin the initiation or continuance of an alteration in the natural condition of a body of water.

Was it justifiable to exempt the state and other governmental bodies from the harmless alteration provisions of subd. (1)? If private persons should be precluded from enjoining harmless alterations in streams and lakes in order to prevent waste of water and to encourage the full development and use of the water resources of the state,¹⁷¹ are there sound reasons why governmental bodies should be permitted to enjoin such alterations and so be in a position to compel waste of water and to discourage its complete beneficial use? It would seem that these questions can be answered in the affirmative.¹⁷²

In the first place, the consequences of recognizing a power in a private riparian owner to enjoin a presently harmless use would appear to be more serious than the consequences of recognizing such a power in a governmental body. Whereas to permit B to enjoin a proposed alteration by A which will cause B no harm until he finds a use for the water is, as previously pointed out, to enable B to compel a waste of water for an indefinite period, to handicap A in order to guard against a contingency which may never occur, and to encourage B to try to extort from A an exorbitant price for B's release of a riparian right which he never intends to exercise,¹⁷³ the possession by a governmental unit of the power to enjoin a harmless alteration in a body of water is less likely to lead to such undesirable results. Because a governmental body which bothered to obtain an injunction against a harmless alteration would normally have a specific use for the water in mind, such as for municipal supply, and would probably be actually putting the water to that use in the reasonably near future, any waste of water caused by its injunction would usually be more short-lived than the waste caused by an injunction against a harmless alteration obtained by a private riparian owner, who might not have in contemplation an actual use of the water at any time, near or remote. Moreover, the risk of attempted extortion would seem to be less when the injunction is obtained by a governmental body than when it is obtained by a private riparian owner.

In the second place, the consequences of refusing a governmental body the power to enjoin harmless alterations in bodies of water might well be more serious than the consequences of refusing to allow a private riparian owner to do so. The public interest which might be protected by the power of a governmental body to enjoin harmless alterations would normally be of greater general importance than the interests which private riparian owners might seek to protect by the exercise of such a power. It could be argued that because B has not made any use of the water prior to learning of A's proposed alteration, he can fairly be subjected to the loss which he might suffer if the court should find that A was entitled to effect gradually rather than

immediately the reduction in his activity required when B finally found use for his share of the water, but that it would often conflict with the public interest to subject a governmental body to such a risk.

Precedent for the preferential treatment given governmental bodies in sec. 15-0701 seems to be afforded by the New York stream protection law¹⁷⁴ enacted in 1965. While this statute does not state expressly that violations of its prohibitions against effecting certain alterations in streams and lakes without state permit can be enjoined by the state without proof that they are causing or will immediately cause harm, neither does it in terms make proof of harm essential to the establishment of an enjoined violation of its provisions.¹⁷⁵ This latter fact suggests the possibility that the legislature had, prior to the enactment of sec. 15-0701, recognized the force of the considerations set forth in the preceding paragraph, and had realized that when the public interest might be at stake, potentially harmful alterations should be enjoined by governmental bodies even before any harm has actually been wrought or is immediately threatened.¹⁷⁶

In the third place, the exemption of governmental bodies, when appearing in the role of plaintiff, from the provisions of subd. (1) of sec. 15-0701 legalizing harmless alterations served to allay the fears of the Conference of Mayors, expressed at the public hearing preceding the enactment of the section, that without such exemption the interests of municipalities in the waters of the state might be insufficiently protected. And finally, the exemption is consistent with the policy long followed in New York of treating public water supply as a special field to be governed by legislation primarily designed to deal with problems in that field rather than by legislation of a general nature.¹⁷⁷

CHAPTER 3

CONSTITUTIONALITY OF SEC. 15-0701 OF THE ENVIRONMENTAL
CONSERVATION LAWConstitutionality of Provisions Purporting to Legalize
Harmless Alterations in the Natural Conditions of
Bodies of Water.

In view of the benefits which the enactment of sec. 15-0701 of the Environmental Conservation Law can reasonably be expected to confer on New York riparian owners and on the citizenry of New York in general it would indeed be a cause for regret if the courts should find it necessary to strike this statute down as unconstitutional. It seems safe to predict, however, that this legislation will not be found vulnerable to attack on constitutional grounds, except possibly in one situation which is not likely often to arise.¹⁷⁸

If the cases which granted injunctions against harmless alterations in bodies of water resulting in changes in their natural condition¹⁷⁹ actually constituted the New York law as of 1965 - and this was quite conceivable as they had never been expressly overruled - one obvious effect of sec. 15-0701 would be to curtail the extent of the riparian interest of an owner of riparian land by subtracting from that interest his right that a harmless alteration should not be made in the body of water to which his land is riparian if such an alteration would change its natural condition, and by subtracting from that interest his power to obtain an injunction restraining such an alteration. Since the New York and federal constitutions prohibit the taking of private

property without due process of law,¹⁸⁰ since riparian privileges and rights constitute private property in New York,¹⁸¹ since a taking of private property without compensation can be a taking without due process,¹⁸² and since sec. 15-0701 makes no provision for compensation¹⁸³ for the reduction it will effect in the quantum of the New York riparian interest if the cases above referred to are still law in New York, it could be argued that the enforcement of sec. 15-0701 against a New York riparian owner would be unconstitutional as involving a taking of property without due process of law.

It is submitted, however, that this contention would fail. Some courts would reject it on the ground that the section is a valid police power regulation rather than a taking of a part of the riparian interest.¹⁸⁴ Other courts, in deference to the view that any curtailment of a property interest, even though small, unavoidably involves a taking pro tanto,¹⁸⁵ would reject the claim of deprivation of property without due process on the ground that a state may constitutionally take private property without compensation by a valid exercise of the police power.¹⁸⁶ Still other courts, while admitting that regulation of property amounts to its impairment, but asserting that when the impairment is small in comparison with the public interest to be served by it, it will not constitute a taking within the meaning of the due process clauses, would conclude that such impairment as might result from upholding sec. 15-0701 would not be great enough to amount to a taking.¹⁸⁷

When determining whether a particular statute constitutes a valid exercise of the police power, a court, regardless of which of the above described approaches to the due process problem it selects, will normally treat one or more of the following factors as having significant

bearing on the question: viz., the extent to which the statute modifies or impairs the property interest of the person attacking it; whether the statute confers on such a party benefits which to a reasonable degree offset what he loses because of the curtailment of his interest by the statute; whether the interest modified or impaired rested on a substantial equity; whether the statute is required by the public health, safety, or welfare; whether the extent and importance of the public interest which the statute would serve outweigh any unfairness, disappointment of legitimate expectations, or financial loss to which the statute would subject the owner of the property; whether the object of the statute is to enhance the economic value of some governmental enterprise or to further the public interest in the equitable resolution of conflicts among private property owners; and whether the statute bears a reasonable relation to the furtherance of the public interests it purports to serve.¹⁸⁸ The last factor listed is frequently stressed. The emphasis placed on any one of the others is largely affected by the facts of the particular case, and to some degree by the court's choice as between the approaches to the due process question described in the paragraph immediately preceding.¹⁸⁹

If one part or all of these factors are taken into account and treated as influential by a court confronted with the question as to whether the legalization of harmless alterations in the natural condition of bodies of water which sec. 15-0701 would effect constitutes a valid exercise of the police power, an affirmative answer may be expected with confidence, despite the fact that the boundaries of the police power continue to lack precise definition.¹⁹⁰ The right and power of which sec. 15-0701 purports to deprive a riparian owner the right that a harmless alteration should not be made in the body of water to which his land is riparian if such an alteration would change

its natural condition, and the power to obtain nominal damages and/or insignificant fraction of his riparian property interest. True it is that this fraction had value to a riparian owner prior to the enactment of sec. 15-0701; for up to that time the New York courts might have felt free to hold in accord with their own dicta¹⁹¹ and with Messinger's Appeal¹⁹² that if a riparian owner failed to sue a party effecting a harmless alteration, a prescriptive privilege to continue it even after it became harmful would be created. In view of this possibility a riparian owner had real use for the power to make harmless alterations the basis for legal and equitable relief.

If A wished to assure himself of the privilege of taking water from a stream or of discharging water into it by buying up the riparian rights of B located below him on the stream, B, prior to the statute, might have held out for an unreasonably high price, even though he had no intention of using any water in the foreseeable future.¹⁹⁴ But the statute provides B with offsets to the loss of this bargaining advantage, if despite its rather anti-social character, offsets are deemed necessary. Because the hazard of prescriptive impairment of riparian interests through failure to obtain an injunction against harmless alterations has been removed by subd. (3) of the statute, B can rely on the riparian doctrine general rule adhered to in New York that riparian rights are not lost by non-use,¹⁹⁵ and need not go to the expense of a suite against A to enjoin his alteration until it becomes actually harmful - an event which conceivably might never occur. Another offsetting advantage which sec. 15-0701 confers upon the riparian owner becomes apparent when it is noted that if he deems himself hindered by the legalization of harmless alterations when he appears in the role of prospective plaintiff, he will find himself aided by such legalization when, because of his water-connected activities, another party casts him in the role of defendant.

Even though sec.15-0701 is in express terms retroactive, it will not subject most riparians to a disappointment of an expectation which can reasonably be classified as legitimate. The power of which it deprives him - to obtain an injunction though not harmed or threatened with immediate harm - is not one on the existence of which a man would normally rely when buying riparian land. If an atypical riparian owner had actually acquired his land primarily for the purpose of extorting an unreasonable price for a release of his power to obtain an injunction though not harmed or threatened with immediate harm, a conclusion that the frustration of this purpose by sec. 15-0701 had unfairly disappointed his legitimate expectation would seem neither justified nor probable.¹⁹⁶

On the other hand, the advantages to the public which sec. 15-0701 is designed to secure - avoidance of waste of water and encouragement of its maximum beneficial use¹⁹⁷ - are obviously of greater importance than and clearly outweigh the loss to riparian owners analyzed above. It seems clear, moreover, that the section bears a reasonable relation to the achievement of these advantages. It should also be noted that the statute is not designed to and does not have the effect of enhancing the economic value of some specific governmental enterprise, but that it is intended rather to further the general public interest in the equitable readjustment of the rights of private riparian owners as among themselves and in the elimination of conflicts between them, and that its principal effect could therefore be fairly described as regulatory.

It should be borne in mind, of course, that since, as already noted, the limits of the police power have never been exactly set,¹⁹⁸ none of the criteria which the courts have from time to time applied when determining whether or not a statute constitutes a valid exercise of the police power and is therefore constitutional despite uncompensated impairment or extinguishment of private riparian interests appears to be capable either by itself or in combination with one or more of the others of reconciling all of the decisions already rendered as to the extent of the police power, or of providing a sure guide as to the outcome in all future cases which might arise concerning the

validity of a statute as a police power measure.¹⁹⁹ When, however, a statute appears to constitute a valid exercise of the police power when tested by all of the most commonly applied criteria, as does sec. 15-0701, the prediction already ventured that it will not be found vulnerable to attack on constitutional grounds, except possibly in one situation which is not likely often to arise,²⁰⁰ seems justified.

And finally it should be noted, when considering whether sec. 15-0701 should and will be held to be a valid exercise of the police power, that there is available guidance more definite and positive than that afforded by any of the criteria referred to above, helpful though they undoubtedly are. As of 1928, because of apparently conflicting court decisions, there was uncertainty in California as to whether a riparian owner had power to prevent appropriation of water for which he had no reasonable use by a party basing his claim to the privilege of doing so on the prior appropriation laws of that state.²⁰¹ The substantial similarity between the subject matter of this uncertainty and the subject matter of the uncertainty existing in New York in 1965 is clear: viz., the New York uncertainty being as to whether a riparian owner had power to prevent an alteration in the natural condition of a body of water which was causing him no harm and would not do so in the immediate future.²⁰² To clarify the California uncertainty a section was added to the California constitution limiting riparian rights "to such water as is reasonably required for the beneficial use to be served" and declaring that "such right does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."²⁰³ Under this provision a riparian owner could not complain of a use of water so long as it caused him no actual damage.²⁰⁴ When it was attacked in *Chow v. City of Santa Barbara*²⁰⁵ as in contravention of the provision of the 14th amendment to the federal constitution forbidding the taking of property without due process of law, it was upheld "as a measure adopted in the exercise of the police power."²⁰⁶ Since the provisions in sec. 15-0701 in regard to harmless alterations in bodies of water will, if upheld, have substantially the same effect as the provisions of the section added to the California constitution,²⁰⁷

the Chow case should and probably would be recognized as an authority squarely in point,²⁰⁸ if the harmless alteration provisions of sec. 15-0701 were ever assailed on constitutional grounds.²⁰⁹ Although Chow was decided in another state, the New York courts might well decide to follow it.²¹⁰

But will the retroactivity provision in sec. 15-0701 encounter constitutional difficulty? Suppose that U and L are respectively upper and lower owners on a stream; that in 1965, and so before the enactment of the section, U begins substantial withdrawals from the stream for irrigation and is continuing them; that his withdrawals have never caused and are not now causing harm to L; but that L nevertheless files suit in 1969 for an injunction restraining them, contending that the retroactivity provision of the section is unconstitutional because depriving him without compensation of the cause of action against U which accrued to L in 1965, if it be assumed that harmless alterations in lakes and streams were then enjoinable.²¹¹ Would a court uphold or reject L's contention?

It is submitted that it should and would be rejected. Granting that a cause of action is property, it is well established that private property rights can, under certain circumstances, constitutionally be impaired or even destroyed by an exercise of the police power;²¹² and there is no apparent reason why property consisting of a cause of action should be entitled to any greater constitutional protection than property consisting of rights, privileges and powers of another sort. If the validity of the section's retroactive provision as a police power measure is tested by the application of the usual criteria,²¹³ a decision upholding the provision would seem clearly proper and could be expected. Legislation abolishing existing causes of action has been held valid, when the court found that the legislature had reasonable grounds for enacting it.²¹⁴ Although it is true that it was held in *Ettor v. City of Tacoma*²¹⁵ and *Forbes Pioneer Boat Line v. Board of Commissioners*²¹⁶ that an accrued cause of action could not constitutionally be destroyed by an exercise of the police power, it appeared in these cases that a contrary holding would have enriched the state at the

expense of the owner of the cause of action in contravention of the principle that when private property is impaired or taken to further a public enterprise, compensation must be made.²¹⁷ The destruction of L's cause of action which the section's retroactive provision would effect would not, however, result in enrichment of the state,²¹⁸ but would rather be in furtherance of a readjustment of the rights and privileges of riparian owners as among themselves; a readjustment analogous to others which have been held to constitute valid exercises of the police power.^{218a}

But could a riparian owner who had effected a harmless alteration in a body of water prior to the enactment of sec. 15-0701 successfully object to its retroactive provision on constitutional grounds? At first glance it might seem that since the principal purpose and effect of sec. 15-0701 is the improvement of the position of a riparian who wishes to make a harmless alteration in a body of water,²¹⁹ the question must necessarily be answered in the negative. But if it be called to mind that it may have been the New York law prior to the enactment of the section in 1966 that an alteration in a body of water was wrongful, even though harmless; that such a harmless alteration therefore started the running of the prescriptive period in favor of the person effecting the alteration; and that its continuance for the prescriptive period would create in such person a prescriptive privilege to continue such alteration in perpetuity, even if it should become harmful to the person against whom the prescriptive privilege was asserted,²²⁰ the possibility that the courts might answer the question in the affirmative becomes apparent.

In 1940 U begins to withdraw water for irrigation, but this causes L no harm because he is not using the stream at this time. In 1965, while U is continuing to withdraw the same amount of water, L also begins to use water from the stream for irrigation, and finds that U's withdrawals are harmful to him because U does not leave enough water in the stream to enable L fully to enjoy his privilege of reasonable user. L brings an action against U in 1967 on the ground that U is

withdrawing an amount of water which is unreasonable under the conditions which began to prevail in 1965.²²¹ U defends on the grounds that he has a prescriptive privilege to continue taking the same amount of water he began withdrawing in 1940, even though such withdrawals are now harmful to L. L denies that U has the prescriptive privilege he claims, contending that under subd. (1) of sec. 15-0701, he (L) had no cause of action against U until 1965 when U's withdrawals first became harmful to L; and that in view of this fact, U could not acquire a prescriptive privilege against L, because it is the general rule that prescription cannot run against the owner of a property interest until there has accrued to him a cause of action by resort to which he could protect his property interest.²²² In rejoinder U argues that because his alteration of the natural condition of the stream by withdrawals in 1940 was wrongful under the New York law then in force, though harmless, a cause of action against him accrued to L in 1940 of which L failed to avail himself during 25 years of U's continuous use, U had acquired a prescriptive privilege long before the enactment of sec. 15-0701 and the institution of L's action. U argues further that the retroactivity provision of subd. (1) cannot constitutionally be applied as against him because the effect of such application would be to deprive him of property without due process of law by uncompensated destruction of a prescriptive privilege which had matured in him before the enactment of the statute. Support for U's contention would be afforded by the rule that after a cause of action has been barred by the running of the statute of limitations, a legislature cannot remove the bar, because such removal would deprive a claimant by prescription of the property he had acquired by virtue of the bar; and that this deprivation would be without due process of law because of failure to provide compensation for it.²²³

While it is true that subd. (1) of sec. 15-0701 does not in express terms purport to remove an existing bar to L's cause of action, it would have, if enforced against U, as adverse an effect against his claim by prescription as if it did purport to remove such a bar

because the subdivision purports retroactively to destroy the cause of action in L which was essential to the beginning in 1940 of the running of the prescriptive period in favor of U. It could be argued then that if a harmless alteration was actionable and capable of serving as the foundation of a prescriptive privilege in New York in 1940, subd. (1) of sec. 15-0701 could not be constitutionally enforced against U, or against other riparians in comparable positions, unless the provision for retroactivity in subd. (1) could be upheld as a valid exercise of the police power.

It is doubtful, however, that the enforcement against U of the retroactivity provision could be upheld on this ground, if in New York a harmless alteration in a body of water was indeed actionable and capable of serving as the foundation of a prescriptive privilege prior to the enactment of sec. 15-0701. Such enforcement would be contrary to the important public policy, implemented by numerous statutes of limitations in all states, in favor of ultimately legalizing long continued courses of conduct, even though wrongful, after the parties wronged by them have failed to bring actions to protect their rights within reasonable period of time. If the public interest in the optimum use of the waters of the state would be furthered to a significant extent by the enforcement of the retroactivity provision against U,²²⁴ the policy underlying statutes of limitation might conceivably be ignored as of relatively less importance. It does not seem likely, however, that enforcement of the retroactivity provision would maximize the beneficial use of New York waters to any significant extent. In the first place the fact that there seems to be but one New York case actually passing on a claim that a harmless alteration had begun the creation of a prescriptive privilege²²⁵ suggests that it is unlikely that the legality of alterations in bodies of water situated in New York would often be affected by retroactive enforcement of a statute purporting to prevent the initiation of a prescriptive privilege by a harmless alteration. Furthermore, it is unlikely that denial of a prescriptive privilege which U believed he had acquired would bring about any increase in the use of the water in many of the few

cases in which the question would arise. The net result most often to be expected would merely be a division of the water between two or more parties without substantial increase in the total amount beneficially used. In short, the expectable gain to the public from retroactive enforcement of the provision would be too small to justify an exercise of the police power to achieve it; particularly in view of the fact that enforcement of this retroactive provision would be contrary to the important public interest in protecting long continued uses.

But even if the courts, in view of the above or other considerations, would be unlikely to uphold the retroactive provision of subd. (1) of sec. 15-0701 as a valid exercise of the police power, it is conceivable that this provision would be found constitutional on another ground. In the discussion of the constitutionality of this provision thus far it has been assumed that it was the law in New York prior to the enactment of sec. 15-0701 that a harmless alteration could initiate the creation of a prescriptive privilege.²²⁶ While, as already pointed out, the New York law on this point was sufficiently doubtful to make the adoption of clarifying legislation advisable,²²⁷ the reasonable probability is that the New York courts would hold that even prior to sec. 15-0701, a harmless alteration could not start the running of the statute of limitations. Although in several New York cases in which harmless alterations were enjoined, the court asserted that such action was necessary to prevent the acquisition of a prescriptive privilege by the defendant,²²⁸ there appears to be no New York case actually holding that a prescriptive privilege had been initiated by a harmless alteration in a body of water. Moreover, what appears to be the only New York decision on this point denies the possibility of initiating a prescriptive privilege in this manner.²²⁹ Since an actual holding, though by the Appellate Division rather than by the Court of Appeals, might well be accorded more weight than a reason given for a decision by the Court of Appeals, particularly when that reason would appear to be invalid,²³⁰ it seems probable that the New

York courts, if confronted with an attack on the constitutionality of the retroactivity provision of subd. (1), would hold that its enforcement would not destroy a matured prescriptive property interest because even prior to its enactment, a harmless alteration in a body of water could not start the running of the prescriptive period in New York.

CHAPTER 4

UNCERTAINTIES WHICH WOULD BE ELIMINATED BY PASSAGE OF THE HARMFUL USE BILL

Sec. 1. As to the Legality of Substantially Harmful but Reasonable Alterations or Activities.⁵⁵

Sec. 2. As to the Legality of Substantially Harmful but Reasonable Diversions of Water, Impoundments of Water, and Additions to Bodies of Water.⁶⁸

Sec. 3. As to the Relevance of the Public Interest when Determining Reasonableness.⁹⁷

Sec. 4. As to the Effect of Malicious Motive on the Legality of an Alteration in a Body of Water.¹¹²

Sec. 1. Uncertainty as to the Legality of Substantially Harmful but Reasonable Alterations or Activities.

There are, of course, as already pointed out, numerous uncertainties in New York riparian law which continue to exist despite the enactment of sec. 15-0701 of the Environmental Conservation Law²³¹ and which should be resolved for the encouragement of private riparian owners contemplating water-based projects, and to prepare the way for multi-purpose governmental water protection and supply projects.²³² Among these is the uncertainty as to whether a water-connected activity which involves substantial harm to riparian owners other than the actor is unreasonable and illegal as a matter of law simply because of the substantiality of the harm, or whether in accordance with the reasonable use version of the riparian doctrine,²³³ such an activity can, despite its substantially harmful character, be found to be reasonable and lawful when other circumstances are taken into account. Doubt concerning this point has been created by New York judicial utterances difficult to reconcile.

Thus while in *Bullard v. Saratoga Victory Mfg. Co.* the court held for the defendant despite its finding that there was no question

but that the manner in which the defendant used its canals caused serious injury to the plaintiff²³⁴ and while in *Henderson Estate Co. v. Carroll Electric Co.*²³⁵ the court said:

"The test is whether the use is reasonable, not whether possible injury may result.",²³⁶

in *City of New York v. Blum* the court declared:

"The defendant had the right temporarily to detain or divert the waters of Pine Stream, but the lower riparian owners...had the right to have that water returned in its natural state, save for such slight diminution or pollution as might necessarily occur from a reasonable use,"²³⁷

and held for the plaintiff. Although the holdings in *Bullard* and *Henderson* would appear to be reconcilable with that in *Blum* because the facts showed that the harm inflicted in *Blum* was easily avoidable by the defendant, whereas the harm caused by the defendants in *Bullard* and *Henderson* was not, the passage quoted from *Blum*, together with the statement in *Robinson v. Davis* that use of a stream for irrigation "must be reasonable and not materially affect the appropriation of water by other proprietors..."²³⁸ obviously could be used as affording some basis for the contention that *Blum* and *Robinson* stand for the proposition that acts causing more than slight harm are unreasonable as a matter of law. The fact that the New York courts have not as yet pointed out that these apparently conflicting cases could be reconciled on the basis of avoidability of the harm would tend, of course, to strengthen the hand of any litigant who cited *Blum* and *Robinson* as indicating that a substantially harmful alteration in a body of water cannot be lawful. Such a litigant would also be aided by the fact that prior to the enactment of sec. 15-0701 of the Environmental Conservation Law, it had been held in several cases that a harmless alteration of a body of water was wrongful and enjoined,²³⁹ and by the basic incompatibility of

these holdings with any claim that a substantially harmful alteration could be legalized by a demonstration of its reasonableness.²⁴⁰

But does the text of the Harmful Use Bill itself cast doubt on the validity of the conclusion above that uncertainty exists today as to the legality in New York of substantially harmful but otherwise reasonable alterations in the natural condition of bodies of water? In sec. 429-k of the bill, which declares the legality of such alterations, it is asserted in substance that such declaration is in accord with the existing New York common law.²⁴¹ Should this assertion be interpreted as indicating that the sponsors of the bill have concluded that there is presently no uncertainty on the point under New York common law? While such an interpretation of the assertion is possible, it would seem to be an unlikely one in view of the familiarity of the bill's sponsors with the conflicting judicial holdings and utterances to which attention has been called in the immediately preceding paragraphs. It seems more probable that the sponsors' approval of the inclusion of the assertion was referable to the following considerations.

If sec. 429-k should be enacted and subsequently attacked on constitutional grounds, the sponsors of the bill, though having good reason for believing it to constitute a valid exercise of the police power,²⁴² would be glad to have another theory - that the bill is merely declaratory of the common law, available to the bill's defenders. The availability of this additional theory might well be increased by a legislative assertion in view of the difficulty of predicting the outcome of litigation involving the extent of the police power;²⁴³ for while legislative expressions of opinion as to the content of the common law are not binding on the courts, they have said that they are entitled to great respect.²⁴⁴

As to the existence in other eastern states of the uncertainty which prevails in New York as to whether or not it is possible for a substantially harmful alteration in the natural condition of a body of water to be lawful, the author cannot speak with assurance, since

his search for relevant court decisions and dicta from the other eastern states has been by no means exhaustive. Some evidence that this uncertainty does exist in several eastern states other than New York has, however, come to his attention in the form of judicial decisions and pronouncements which could be interpreted as being in conflict.

Examples of such apparently conflicting holdings and statements appear in the Connecticut reports. Thus while in *Wadsworth v. Tillotson*²⁴⁵ the court quoted with approval the statement in Kent's Commentaries that a riparian owner must so use the water as not to materially diminish or affect its application by downstream owners and while in *Adams v. Greenwich Water Co.*²⁴⁶ the court declared that any infringement of the riparian owner's right to have the stream continue to flow in its wanted manner entitles him to damages, even though the actual provable damage is small, the court held in *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*²⁴⁷ that the defendant's materially harmful detention of water for power generation was lawful because reasonable under all the circumstances. Keeney might, of course, be reconciled with *Wadsworth* and *Adams* on the basis of the court's statement in Keeney that the maxim that water must be allowed to flow in its normal manner was not applicable in power cases.²⁴⁸ The question would remain nevertheless as to whether the Connecticut courts would today look upon *Wadsworth* and *Adams* as stating a general rule that substantially harmful uses cannot be lawful, and on Keeney as recognizing the only exception to such rule, or whether they would take the position that Keeney showed that an exception to the general rule could be made whenever it seemed advisable because of the impracticability of carrying on the defendant's activity without causing substantial harm and because of the importance of his activity to the public; and that therefore the Connecticut rule actually is that any substantially harmful alteration in a body of water could be held lawful, provided that it were found to be reasonable under all the circumstances.²⁴⁹

Further examples of holdings and statements which, when compared, raise a doubt as to whether a substantially harmful alteration in a body

of water can ever be lawful are afforded by the Illinois cases. Whereas in *Rudd v. Williams*²⁵⁰ the court said in substance that a riparian owner must so use the water as not to cause injury and in *Tetherington v. Donk Bros. Coal Co.*²⁵¹ the court declared that each riparian owner must submit to reasonable use by the others, "so long as such use does not inflict substantial injury upon other owners", in *Bliss v. Kennedy*²⁵² the court took the position that in time of shortage the water must be shared by consumptive users - a position which legalizes the infliction of substantial harm since, if the shortage is acute, each riparian user who takes even his diminished share will not infrequently be causing substantial harm to his fellow riparians and would himself be suffering like harm at their hands.²⁵³ Moreover in *W.H. Howell Co. v. Chas. Pope Glucose Co.*²⁵⁴ the court held that it would not enjoin a substantially harmful detention of water until it had been determined in a action at law that the detention was unreasonable; a holding which surely would never have been rendered unless it were possible for a substantially harmful alteration in a body of water to be lawful in Illinois if found to be reasonable.²⁵⁵

In Massachusetts also there appears to be uncertainty as to whether a substantially harmful alteration in a body of water can be ever lawful. While in *Parker v. American Woolen Co.*²⁵⁶ the court said that no one would have a right to complain of pollution which was the result of watering cattle or of irrigating fertilized fields,²⁵⁷ the court also declared in support of its holding that a defendant should be enjoined from polluting a stream that

"The right to use the stream to carry away mere waste matter in a reasonable manner and to a reasonable extent is not so to be extended as to include a right to discharge into the stream noxious and deleterious matter to such an extent as sensibly and materially to foul the water and destroy its purity and fitness to be used by others."²⁵⁸

On the other hand in *Gould v. Boston Duck Co.*²⁵⁹ it was held that a materially harmful detention of water by the defendant for power generation

was lawful. It is true that these cases, like those in New York referred to above²⁶⁰ can be reconciled on the avoidability ground because in Parker in which the plaintiff was successful the court found that the defendant could have avoided the harm without undue difficulty, whereas in Gould in which the plaintiff failed the court implied that it might have been practicable for the plaintiff to have avoided the harm. Moreover, it would seem that these Massachusetts cases, like those in Connecticut previously referred to,²⁶¹ might also be reconciled on the ground that an exception to the general rule against substantial harm, if there is in fact such a rule in Massachusetts, should be made in favor of alterations in bodies of water for power generation. But the fact that no reconciliation of the Massachusetts cases on either basis appears to have been made explicitly by the Massachusetts courts themselves leaves all too much room for doubt as to what the Massachusetts law is on the point under consideration.²⁶²

Judicial utterances by North Carolina courts which might be construed as contradictory seem to justify adding that state to the list of eastern jurisdictions in which it is doubtful whether or not a substantially harmful alteration in a body of water can be lawful if reasonable. Thus while it was said in Williamson v. Lock's Creek Canal Co.²⁶³ that every riparian owner "has a right to the reasonable use of the water...provided he does not by his use of it, materially damage any other proprietor above or below" and in Harris v. Norfolk and Western Ry Co.²⁶⁴ that riparian proprietors "may use the water for any purpose to which it can be beneficially applied; but in doing so they have no right to inflict material or substantial injury upon those below them," in Mizell v. McGowan²⁶⁵ the court took the position that it would be lawful for a riparian owner to conduct surface water from his land into a stream, even though the lower riparian owners would suffer substantial harm because the surface water added to the stream exceeded its carrying capacity. So one pondering the meaning of the North Carolina cases is faced with the question which would confront one trying to interpret the Connecticut and Massachusetts detention for power cases cited above:²⁶⁶ viz., as to whether Mizell merely

creates an exception to a rule forbidding substantial harm, or whether it should on the other hand be taken as affording an instance of the application of a general rule that an alteration in a body of water, though causing substantial harm, can be lawful if reasonable.

Pennsylvania is another state whose law reports appear to afford bases for a doubt as to what the law is on the question at hand. While the legality of substantially harmful but reasonable detentions of water for power purposes seems clearly established in Pennsylvania²⁶⁷ as in Connecticut,²⁶⁸ Massachusetts²⁶⁹ and New York,²⁷⁰ despite general statements like the one found in *Pa. Rr. Co. v. Miller*²⁷¹ that a riparian owner may use the water "provided such use is not of a character to injure other riparian owners," the question remains, as in some other eastern states, as to whether the rule of the water power cases can be generalized for application to alterations of bodies of water for other purposes. True it is that the celebrated case of *Pa. Coal Co. v. Sanderson*,²⁷² in which the substantially harmful pollution of a stream with mine water was held lawful, affords some basis for an affirmative answer to this question.²⁷³ However, when considering what effect to attribute to this decision, it should be borne in mind that although the facts stressed by the court - the plaintiff's ability to avoid the major part of her harm by obtaining her domestic water supply from a municipal source, the defendant's inability to avoid the harm under the conditions prevailing in the coal mining industry at that time, and the transcendent economic importance of that industry to Pennsylvania - tended to indicate that the court was recognizing a general rule that a substantially harmful alteration in a body of water can be lawful if reasonable, the court did not expressly state such a rule. It should be noted also that no decision like that arrived at in *Sanderson*, aside from those in the water for power detention cases, seems to have been rendered in Pennsylvania either before or after the *Sanderson* litigation. So in Pennsylvania, as in other eastern states referred to above, there appears to be doubt as to whether the decisions for the defendant in cases involving substantial harm are mere specific exceptions to a general rule that a substantially harmful alteration

cannot be lawful, or may be interpreted as establishing a general rule that such an alteration may be lawful if reasonable under all the circumstances.²⁷⁴

The evidence pointing to the existence of uncertainty in several of the eastern states as to whether it is possible for a substantially harmful alteration in the natural condition of a body of water to be lawful which is afforded by the apparently conflicting judicial decisions and statements discussed above would seem to be considerably strengthened by the absence from such of the recently prepared descriptions of water law in the eastern states as have come to the author's attention of any statement as to the position taken by the courts on the question under consideration.²⁷⁵ If it were indeed clear that in state X a general rule had been adopted that a substantially harmful alteration in a body of water is lawful, if reasonable, or that such an alteration cannot be reasonable and therefore must be unlawful, a description of the water law of state X would almost surely call attention to the prevalence of such a rule. The failure of any such description to do so probably warrants the inference that there is uncertainty as to the state of the law on the point under discussion in the jurisdiction the law of which the description purports to set forth.²⁷⁶

It would seem, moreover, that uncertainty as to whether a substantially harmful alteration in a body of water can ever be lawful exists even in states whose courts appear to have adopted the reasonable use version of the riparian doctrine. While such adoption, unless declared to be on a limited basis, would involve acceptance of the view that a substantially harmful alteration can be lawful if reasonable,²⁷⁷ it is not entirely clear that every court which has or may seem to have elected the reasonable use version realizes that such a view is a constituent element of that version, and would be willing actually to hold that a jury could bring in a verdict for a defendant who had inflicted substantial harm on a plaintiff if the defendant could convince the jury that his conduct was reasonable. Thus while it was held in Minnesota, where the reasonable use version of the

riparian doctrine has long been in force,²⁷⁸ that the use of lake water for the benefit of a private golf course was lawful because the plaintiff was unable to show any substantial damage,²⁷⁹ the Minnesota court declared in a subsequent case that

"One of the incidents of riparian ownership is the obligation to do nothing which affects the water level of the lake so as to do substantial harm to another riparian owner."²⁸⁰

It is also worthy of note in this connection that although a Florida court has implied that the reasonable use version of the riparian doctrine prevails in that state, and that a defendant who "unreasonably" affects plaintiff's use of a lake by lowering its level would be held liable, its language did not clearly preclude the possibility that a lowering of a lake level resulting in substantial harm would always be viewed as unreasonable.²⁸¹ Such extensive protection of a stream or lake level would not, of course, be too suprising in Florida or Minnesota where the preservation of natural beauty and water-based recreational opportunities are so important to the economy.

Indeed it could be argued that arrival at such a result would actually be basically consistent with rather than in conflict with the view that a substantially harmful alteration in a body of water is lawful when reasonable. While a riparian owner who insists on the maintenance of a lake's natural level in the interest of his recreational activity is not, to be sure, claiming the privilege of altering the lake to the substantial harm of other riparians, he is in fact insisting on the support of his activity by all the water naturally in the lake, which is tantamount to a claim to a use of all of its water. Thus if a court yields to his insistence in a case in which the maintenance of the natural lake level inflicts substantial harm on another riparian by preventing him from withdrawing water for some consumptive use, the court is in effect legalizing a substantially harmful use of the lake by the successful party. As the author knows of no case, however, in which the court has indicated its awareness of the possibility that it

may in fact be legalizing a substantially harmful use of a body of water by the plaintiff when it holds that the defendant may not lower its level,²⁸² he does not feel justified in citing decisions protecting lake levels against consumptive users as evidence that some courts have adopted the view that a substantially harmful alteration in a lake or use of its water can be lawful if reasonable. Legalization of the substantially harmful maintenance of a lake level would, of course, seem to be sound and in accord with the reasonable use version of the riparian doctrine if such maintenance is reasonable despite the harm it causes; there being no compelling reason why a use of a body of water which can be made without altering its natural condition should not be controlled by the same principles as should govern water uses involving alterations in the physical condition of the water source.²⁸³

If the analysis attempted in the preceding paragraph is correct, it would seem to follow that courts basing protection of a lake level on the natural flow version of the riparian doctrine²⁸⁴ in cases in which such protection is substantially harmful to a competing use are holding in substance that non-consumptive uses can be lawful though substantially harmful. The obvious objection to relying on the natural flow version for the proper disposition of such cases is, of course, that the substantially harmful non-consumptive use may be held lawful even though it would appear to be clearly unreasonable when compared with the competing use prohibited by the decision.²⁸⁵ Under the reasonable use version of the riparian doctrine, however, an unreasonable substantially harmful use, whether consumptive or non-consumptive, will never be held lawful when that version is properly applied.

This apparently unconscious legalization of substantially harmful alterations in or uses of bodies of water has occurred not only in cases involving competition between a consumptive alteration or use and one which is non-consumptive, but also in cases in which all the competing alterations or uses are consumptive. Thus some courts have taken the position that L, an lower riparian owner making a consumptive use of a stream, can restrain U, an upper riparian owner, from making

such a use if it is causing L substantial harm; and have done so without referring to the fact that the protection of L's claim to the water will cause U substantial harm, or to the fact that their decision in effect legalizes the infliction of such harm on U by L.²⁸⁶ In other words, some courts, while purporting to hold that a substantially harmful alteration or use is necessarily unreasonable and therefore unlawful, have in effect held just the opposite by legalizing one of two competing claims to water, either one of which would, if upheld, cause substantial harm to another riparian. In many such cases it would seem preferable to accept the doctrine that substantially harmful alterations and uses can be lawful when reasonable, and to apportion the water between the competing claimants in times of shortage,²⁸⁷ even though each party sustains substantial harm when he is required to share.²⁸⁸

Since there is uncertainty in New York as to whether a substantially harmful alteration in the natural condition of a body of water will be lawful if reasonable, it would seem advisable to resolve it by legislation; and that a similar step should be taken in any other eastern state in which this uncertainty prevails. As long as it does it will have a tendency on the one hand to discourage the optimum development and use of streams and lakes by private enterprise and to impede the planning and execution of public water projects. On the other hand the prevalence of this uncertainty may tend to encourage litigation obstructive of water-based projects instituted by plaintiffs hoping that the courts will ultimately take the position that an alteration cannot be lawful if substantially harmful,²⁸⁹ and that the fear of such litigation would enable them to charge prospective developers of water resources inflated prices for water rights. The fact that other uncertainties tending to discourage private investment and to impede public water projects, while encouraging obstructive litigation should for sound reasons be allowed to remain only partially resolved²⁹⁰ makes it all the more important that such uncertainties as can be removed without undesirable side effects be resolved by legislation.

If it be granted that the uncertainty as to the legality of substantially harmful but reasonable alterations in the natural condition of bodies of water should be eliminated by legislation, the question remains as to what position on the question the clarifying statute should take. It is submitted that it should declare, as does sec. 429-k of the Harmful Use Bill,²⁹¹ that such alterations are lawful. If the contrary position is taken, there will be situations in which the riparian owner who first exercises his riparian rights will acquire a permanent advantage over a riparian who is not in a position to develop his riparian land as quickly. Thus, if A begins to irrigate, withdrawing X gallons daily for use on his riparian land; if B, higher up on the stream, thereafter begins to irrigate, withdrawing Y gallons daily for use on his riparian land; if B's withdrawals leave available for A only X minus Y gallons; if X minus Y equals one-half of X gallons; and if A's crop is substantially reduced because A can now obtain only half the water originally available to him, B's alteration of the stream by his withdrawal of Y gallons daily is clearly causing A substantial harm, and would therefore appear to be unlawful under a rule that an alteration in the natural condition of a body of water which causes substantial harm to another riparian is wrongful.

It is submitted that the result which would apparently follow in this hypothetical case under such a restrictive rule affords evidence of the undesirability of the rule. In the first place, such a result would be in conflict with several valuable basic principles of the riparian doctrine: viz., that priority in time does not necessarily create priority in right;²⁹² that riparian rights are not lost by non-use;²⁹³ that the extent of riparian rights varies from time to time in response to changes in the situation - in the hypothetical case the situation changed when B began to irrigate;^{293a} and that riparian rights are equal.^{293b} In the second place, the result which would be arrived at in the hypothetical case under the restrictive rule would tend toward an undesirable rigidity in the pattern of water use, which might make it difficult to satisfy important new water needs as they arose from time to time.²⁹⁴

Moreover, acceptance of a rule that a use, alteration or activity which causes substantial harm is unlawful for that reason alone would automatically exclude from consideration circumstances which have often

properly been taken into account by the courts when passing upon the reasonableness and legality of a particular water-connected activity. In other words, the restrictive rule makes harm to the complaining party a decisive factor by itself, provided only that it is substantial. That harm of such degree should be and is an important factor when determining legality cannot be denied;²⁹⁵ but that such harm should be treated as but one of several important factors contributing to the final result seems equally clear.²⁹⁶ There well may be situations in which a use of, alteration in, or activity connected with a body of water should be held lawful, although causing substantial harm, because of its importance to the public and defendant's inability to avoid the harm,²⁹⁷ or because the plaintiff's activity is unsuited to the neighborhood,²⁹⁸ or because the plaintiff could practicably minimize the harm,²⁹⁹ or because the stream comes to the defendant's tract before reaching the plaintiff's and because if each riparian is not allowed to cause some harm, even though substantial, by his use of the stream as it comes to him, its potential utility can never be fully achieved.³⁰⁰

The legalization of substantially harmful alterations, use and activities, if reasonable, would not, of course, be in conflict with the venerable maxim *sic utere tuo ut alienum non laedas*; for its proper meaning is that property must be so used as not to violate the rights of another. In other words, it does not mean that property must not be so used as to harm another.³⁰¹ The infliction of substantial but reasonable harm on the complaining party cannot therefore violate the maxim, if he has no right that such harm shall not be inflicted;³⁰² and this would be the case under the legislation recommended.

It should be noted moreover that such legislation could be so worded as to make it clear that it would not apply to such powers as the state or any of its subdivisions or agencies might have to prevent alterations, uses or activities now forbidden or which might in the future be forbidden in the public interest, and so would not interfere with the enforcement of anti-pollution³⁰³ and stream and lake protection statutes³⁰⁴ already in force or which might be enacted later on. Thus the Harmful Use Bill is so worded as not to conflict with the governmental

regulatory function.³⁰⁵ Even if in litigation between two private persons, the trier of the fact should find that the defendant's pollution of a stream was reasonable as far as the plaintiff was concerned, although he was harmed by it,³⁰⁶ the state would not be precluded from proceeding against the defendant if the pollution he caused was in violation of some statute or regulation. It is to be hoped, therefore, that the New York legislature will ultimately pass the Harmful Use Bill which has already been twice before it without coming to a vote;³⁰⁷ and that other eastern states whose common law is uncertain as to the legality of substantially harmful but reasonable alterations, uses and activities, as well as any eastern state in which the law now is that no substantially harmful alteration, unless in furtherance of a domestic use, can ever be reasonable and lawful, will enact similar legislation.

Sec. 2. Uncertainties as to the Legality of Substantially Harmful but Reasonable Diversions of Water, Impoundments of Water, and Additions to Bodies of Water.

Another question in regard to New York riparian law which remains unanswered despite the enactment of sec. 15-0701 of the Environmental Conservation Law is the following. Even if it be assumed that the New York law has been and still is that substantially harmful alterations in bodies of water are in general lawful if reasonable, have some exceptions to this rule been created under which certain particular sorts of alterations would be unreasonable as a matter of law and therefore illegal? For example, could a New York riparian owner escape liability for substantial harm resulting from the diversion of a stream by demonstrating that the alteration was reasonable despite its particular sort and its substantially harmful character? The statement in *Garwood v. New York Central & Hudson River Rr.* that it is the rule that a riparian owner has no right to divert any part of the stream into an unaccustomed course "for any purpose" to the prejudice of another riparian proprietor³⁰⁸ and the holdings in *Smith v. City of Rochester*³⁰⁹ and *Neal v. City of Rochester*³¹⁰ that diversions of stream water could be

enjoined, even though the defendant was preventing harm to the plaintiff by adding enough water from another source to compensate for the diversions, tend to support a negative answer to this question.³¹¹ On the other hand, the following statement in *Strobel v. Kerr Salt Co.* points toward the opposite conclusion:

"Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water causing some loss, are not regarded as an unlawful diversion... the lower owners must submit to such loss as is caused by reasonable use."³¹²

Whether there is a real or merely an apparent conflict between *Garwood*, *Smith and Neal* on the one hand and *Strobel* on the other with respect to the possible legality of substantially harmful diversions of bodies of water would seem to depend to an important extent upon the sense in which "diversion" was used in these cases.³¹³ As in *Smith and Neal* the defendant was so dealing with the lake involved that a large part of its water was led away from its natural course into another and would never reach the plaintiff's land, they could be interpreted as stating a rule applicable only to alterations which effected a change in the natural course of a body of water and as leaving open the question as to whether a consumptive use of water which prevented part of the lake or stream from reaching the plaintiff, but did not involve an alteration of its natural course, would constitute a diversion and would necessarily be illegal because it was a diversion. As the court in neither case offered a definition of diversion, the validity of this interpretation is, of course, debatable.

Conflict between *Smith v. City of Rochester*, *Neal v. City of Rochester* and *Smith v. City of Brooklyn*³¹⁴ on the one hand and the *Strobel dicta* on the other might conceivably be resolved on either of two other grounds: viz., by pointing out that the diversions which were held unlawful in the first three cases referred to were for the

benefit of non-riparian land,³¹⁵ whereas the Strobel dicta were in regard to diversions for the benefit of riparian land; or by pointing out that the New York courts by uniformly holding that substantially harmful diversions of water for municipal supply constitute compensable violations of private riparian rights³¹⁶ have held in effect, though not expressly,³¹⁷ that such withdrawals are unreasonable, thus leaving room for holdings that substantially harmful diversions, if not for municipal supply, could be lawful if reasonable. It should be borne in mind, however, that the New York courts apparently have never stated that the reconciliation in question could be effected in either of these ways, and that it is not certain that they will ever do so.

The question which was left open in *Smith and Neal v. Rochester*: viz., whether a consumptive use of water which prevented part of a stream from reaching the plaintiff but did not involve an alteration of its natural course, would constitute a diversion and would necessarily be illegal because it was a diversion, was answered in the affirmative in *Garwood* by an opinion which referred to the withdrawal of water for use in the defendant's locomotives to the damage of the plaintiff as a diversion which carried the water away from the plaintiff's premises as effectually "as if it had been turned into another channel,"³¹⁸ and by a holding that such diversion was unlawful despite the fact that the defendant had not altered the stream's course of flow.

As "diversion" was defined in *Strobel* as "taking water from a stream and not returning it, so that the lower riparian owner can use it,"³¹⁹ and as the holding in *Strobel* was that the defendant had been guilty of a harmful and unlawful diversion effected by the withdrawal of water from a stream and its evaporation in the process of salt manufacture, the conception of diversion adopted in *Strobel* and the holding in that case are in accord rather than in conflict with the positions taken in *Garwood*, which the court cited with apparent approval in *Strobel*.³²⁰ On the other hand, the *Strobel* dicta quoted above clearly indicate that a diversion of the general type involved in *Garwood* and *Strobel* would not be unreasonable and unlawful in every

instance, even though it caused harm. Thus there is appreciable basis for the contention that an actual conflict exists between Garwood and Strobel on this point, particularly in view of the equation in Garwood of a consumptive use which leaves the course of the stream unchanged with an alteration in a stream which actually involves a change in its course, and in view of the failure of the court in Garwood, as in Smith and Neal, to give any consideration to the possibility that a harmful diversion might be lawful, if reasonable.

Moreover, since the Strobel dicta were not so phrased as to exclude from their scope a harmful alteration in a stream which involved a change in its course, these dicta might not unreasonably be interpreted as indicating that even such an alteration could under appropriate circumstances be held reasonable and lawful; a type of alteration which in Garwood, Smith and Neal was apparently looked upon as unquestionably unlawful.³²¹

While in view of the foregoing the New York scales appear to be tipped somewhat in favor of the view that a harmful diversion is unreasonable as a matter of law and is therefore unlawful,³²² it is not entirely clear that this is the New York law, especially since the New York courts have so seldom offered any definition of "diversion," and apparently have never given thorough consideration as to what that definition should be. It would seem, therefore, that the existing New York law in this area, is uncertain.

A rather random and scanty sampling of the cases in other eastern states as to the legality of substantially harmful but reasonable diversions of the water of lakes and streams has led the author to suspect that New York is not the only eastern state in which the law on this point is presently uncertain. Thus while it seems quite clear that substantially harmful withdrawals of water for municipal supply are wrongful in Connecticut, even though no alteration of the stream's course is involved,³²³ what little authority there seems to be as to the legality of substantially harmful irrigation could be interpreted as being in conflict. Thus Howard v. Mason³²⁴ is cited in Perkins v. Dow³²⁵ as having held that diversion for irrigation, though greatly

prejudicial to the plaintiff, is lawful provided the defendant acted "prudently, and did not deprive the plaintiff of the surplus." This in substance appears to be a holding that substantially harmful diversion for irrigation is lawful if reasonable. In *Gillett v. Johnson*,^{325a} however, the court took the position that diversion for irrigation would be lawful if the defendant left enough water to supply plaintiff's cattle, which in substance appears to be a declaration that a harmless diversion for irrigation would be lawful, and to intimate that a substantially harmful diversion for irrigation would be unlawful. These two cases might be reconciled on the ground that the plaintiff in *Gillett* was making a domestic use of the water - a natural use entitled to preference³²⁶ over any artificial use such as irrigation;³²⁷ whereas in *Howard* the plaintiff's use for power was as much an artificial use³²⁸ as that of the defendant for irrigation. It should be noted, however, that the court in *Gillett* did not elect to base its declaration on the preferred status of a user for domestic purposes. Since *Collens v. New Canaan Water Co.* appears to classify any act which diminishes lake level or stream flow as diversion, even though the course of the body of water remains unaltered,³²⁹ there might well be uncertainty in Connecticut as to whether any substantially harmful consumptive use of lake or stream water could be held lawful if found to be reasonable.³³⁰

Since it has been pointed out by commentators well versed in Illinois water law that diversion of a stream from its natural course is normally actionable even without proof of present damage³³¹ and that such a diversion is apparently treated in Illinois as unreasonable as a matter of law,³³² and since these statements are well supported by the cases which these commentators cite,³³³ it seems safe to conclude that the Illinois law as to the possible legality of diversions of lake or stream water is appreciably less uncertain than that of New York and of some other eastern states; at least if the term "diversion" is applicable in Illinois only to alterations in the natural condition of a stream which involve a change in its course. But as the Illinois courts apparently have not as yet explicitly defined diversion so narrowly, and as other states have defined it broadly enough to include

withdrawals for consumptive uses which do not involve an alteration in the stream's course,³³⁴ it is conceivable that the Illinois courts might eventually follow suit.³³⁵ The question would then arise as to whether a substantially harmful diversion of this type could be lawful in Illinois if reasonable. While Illinois cases strongly pointing to an affirmative answer to this question have already been cited, it will be remembered that they appear to conflict with the position taken in others.³³⁶ So while the Illinois law as to the illegality of diversions involving changes in the stream's course appears to be quite certain, the Illinois law as to the possible legality when substantially harmful of other alterations in the natural condition of a lake or stream which might possibly be classified as diversions appears to be uncertain.

In two respects the Massachusetts law governing the diversion of stream water seems to be reasonably clear. First: Since an alteration in the natural condition of a stream which changes its course will constitute an actionable diversion without proof of damage,³³⁷ a substantially harmful alteration of this character will *a fortiori* be unlawful.³³⁸ Second: It is not necessary moreover, to the establishment of a diversion to show that the defendant's alteration in the natural condition of a stream has changed its course, since withdrawals of water which merely diminish the flow of a stream without changing its course can under some circumstances amount to a diversion.³³⁹ There are, however, apparently conflicting holdings and statements by the Massachusetts courts having a bearing on the possible legality of substantially harmful diversions effected by withdrawals without change of course when reasonable under all the circumstances. Pointing toward the recognition of such a possibility is *Weston v. Alden*³⁴⁰ in which defendant's withdrawal of water from a stream for irrigation was held lawful although such withdrawal caused great damage to plaintiff's meadow. Pointing in the same direction is the express approval of *Weston* in *Cook v. Hull*,³⁴¹ and the assertion in that case that *Colburn v. Richards*,³⁴² which held defendant liable for irrigation withdrawals, was distinguishable from *Weston* because the plaintiff in *Colburn*, though

downstream from the defendant, had acquired prescriptive rights in the stream prior to defendant's withdrawals.³⁴³ Also tending to support the existence of the possibility under consideration are the following statements made by the court in *Elliott v. Fitchburg Rr. Co.*:

"The instruction requested by the plaintiff is, we think, founded on a misconception of the rights of riparian proprietors in watercourses passing through or by their lands. It presupposes that the diversion of any portion of the water of a running stream, without regard to the fitness of the purpose, is a violation of the right of every proprietor of land lying below, on the same stream, so that, without suffering any actual or perceptible damage, he may have an action for the sole purpose of vindicating his legal right. The right to flowing water is now well settled to be a right incident to property in the land; it is a right publici juris, of such character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet...each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down."³⁴⁴

On the other hand, the holding in *Lund v. City of New Bedford*³⁴⁵ that the harmful withdrawal of water from a stream for municipal supply constituted an actionable diversion, though the course of the stream was not altered, and with no suggestion that the diversion might have been lawful if reasonable,³⁴⁶ and the statement in *Peck v. Clark* that an action could be maintained without proof of damage for withdrawals of water from a stream for domestic use by an aqueduct because it would constitute a continuous diversion with a permanent effect "which would interfere with the exercise of the plaintiff's rights whenever thereafter he sought to exercise them"³⁴⁷ tend to support the conclusion

that in Massachusetts diversion by withdrawal cannot be lawful if substantially harmful; at least if it, like most withdrawals, is likely to continue for a considerable period.

North Carolina is another state in which there appears to be uncertainty at present as to whether a substantially harmful diversion of a stream could be held lawful if found to be reasonable. The statement in *Dunlap v. Carolina Power & Light Co.* "that any substantial diversion of water...of a stream gives rise to a cause of action in behalf of all riparian owners affected thereby"³⁴⁸ and equivalent declarations in other cases,^{348a} tend to support a negative answer to the question. It should be noted, however, that it was also said in *Dunlap* that

"Every riparian owner has a property right to the reasonable use of running water for...agricultural purposes conformable to the uses and needs of the community, qualified only by the requirement that it must be enjoyed with reference to the similar rights of other riparian owners."³⁴⁹

This statement would clearly seem to be applicable to a use of stream water for irrigation, since such a use is obviously one for agricultural purposes. But as irrigation is just as obviously a consumptive use, use for irrigation would also constitute a diversion under the definition of "diversion" as applied to watercourses accepted in *Sherrill v. North Carolina State Highway Commission*: viz., "a taking of water from a stream and not returning it so that the lower riparian owner can use it."³⁵⁰ It could be argued then that the effect of *Dunlap* and *Sherrill*, when read together, is that substantially harmful withdrawals for irrigation, though constituting a diversion, could be held lawful in North Carolina when found to be reasonable. But as *Sherrill* did not involve a consumptive use, it is no more certain that the definition of "diversion" set forth in that case will in the future be applied to such uses in North Carolina than it is that the statement in *Dunlap* as to the legality of reasonable agricultural uses will be held applicable in that state to irrigation causing substantial harm. Thus while

alteration of the course of a stream is probably an illegal diversion in that state,³⁵¹ the question as to whether a substantially harmful diversion by water withdrawal can be lawful when reasonable would appear to be open.³⁵²

Assuming that it is sound to eliminate uncertainty as to the legality of substantially harmful but reasonable alterations in the natural condition of a body of water by enacting legislation applicable to such alterations in general and expressly legalizing them, the question remains as to whether such legislation should be so drafted as to be clearly applicable to substantially harmful but reasonable alterations involving diversions of water from lakes and streams, or even changes in the situs of lakes or in the course of streams. It would seem that an affirmative answer should be given to this question. A review of the reasons which support the establishment of a rule legalizing substantially harmful but reasonable alterations in general will reveal that they tend to support a rule legalizing substantially harmful but reasonable alterations of the diversion type.³⁵³ If alterations in general should not necessarily be illegal merely because they are substantially harmful, then alteration by diversion should not necessarily be illegal in the absence of some additional reason.

Discrimination against alterations by diversion merely because of their type would deal a severe blow to agriculture in any eastern state in which, as in New York, irrigation has become of great importance and in which judicial utterances have indicated that withdrawals of water for consumptive uses constitute diversion,³⁵⁴ even though neither the location nor the course of the body of water affected is changed.

Since a lower riparian owner may, in some instances, suffer no more harm from a diversion effected by a change in the location or course of a body of water than from a diversion resulting from a consumptive use,³⁵⁵ not even diversions of the former type should be absolutely forbidden in this day and age, provided that it appears when the permission to divert is sought that the body of water could practicably be returned to its original location if and when the new location became unreasonable because of changes in the circumstances bearing on the reasonableness of the diversion. While all diversions involving changes in the location of a

body of water might well have been looked upon in the past as irreversible because of physical difficulties and expense,³⁵⁶ now some of them at least would not be in view of the capabilities of modern engineering. The cost of restoring a body of water to its original location or course would indeed normally be great; and this fact would afford some basis for the argument that despite the variability principle of the reasonable use version of the riparian doctrine,³⁵⁷ a riparian owner opposed to the continuance of a new location of a body of water could never induce a court to order that it be restored to its original location because of the natural reluctance of a court to compel a defendant to undertake such an expensive task, and that therefore diversions involving changes in the location of bodies of water should never be permitted. But this hazard would not seem to be so great as to require that alterations in the location or course of bodies of water be held unlawful in every instance. They should simply be viewed as one factor to be given weight when passing on the reasonableness of the proposed alteration in the first instance, or on the reasonableness of a demand in the future for termination of the alteration.³⁵⁸ A party objecting to such an alteration could protect himself to a considerable extent by bringing an action for a judgment declaring that if continuance of the alteration should become unreasonable under changed conditions,³⁵⁹ he would be entitled to have it modified or undone altogether, and that the party proposing the alteration could not make it unless he produced a bond, with financially capable sureties, guaranteeing his compliance with a modification or restoration order if and when issued.³⁶⁰

Would a statute legalizing substantially harmful diversions of water from lakes or streams when reasonable under all the circumstances be open to the objection that it would increase the number of instances in which it is now possible for the state of New York to do or authorize acts in aid of some public enterprise which would impair or destroy the riparian interests of private riparian owners without compensating them for their losses although it could be argued that it would be more just to place the financial burden of the enterprise on the large number of persons who are to be directly benefited by it? For example, would it enable the state to cut off the water supply of private riparian owners by massive

diversions for municipal supply, or to authorize a municipality to do so, without compensating the private riparians harmed by the diversion in instances in which the state cannot do so under existing New York law? It is submitted that this question can be answered in the negative.

The sovereign power which the state already has over navigable lakes and rivers if it owns their beds, a power apparently separate and distinct from its navigation and police power, and which has been held to enable the state to collect rent from riparian owners on the Niagara River who use its water for power,³⁶¹ and to fix seasonal levels for Lake George,³⁶² and which, following the lead of Minnesota,³⁶³ might well be held to enable the state to authorize diversion for municipal supply of water from a river with a state-owned bed without compensation to riparian owners harmed by the diversion,³⁶⁴ would not be broadened in scope by legislation legalizing substantially harmful diversions if reasonable. Exercise of any power which the state might derive from such a statute would be subject to a condition more difficult to fulfill than the condition to which the exercise of the state's already existing sovereign power is subject. Under the statute the state could divert water for municipal supply without compensation to private riparians harmed by the diversion only if it could establish that the diversion was reasonable under all the circumstances, which would involve consideration of the harm objecting riparians would suffer³⁶⁵ as well as the benefit to the public; whereas under the sovereign power which the state already possesses it could justify diversion of water for municipal supply without compensation to harmed riparians merely by pointing to the obvious fact that the diversion was for a public purpose.³⁶⁶

Nor is it probable that a New York court would believe that it could use a statute legalizing substantially harmful diversions of water when reasonable under all the circumstances to justify a decision in a particular case that a substantially harmful diversion for municipal supply from a lake or river, the bed of which was privately owned, could be lawfully effected without compensating the private riparian owners harmed by the diversion.³⁶⁷

Such diversions are in most eastern states held unlawful on one ground or another.³⁶⁸ Municipal supply is usually classified as a non-riparian use,³⁶⁹ a classification in which New York apparently concurs;³⁷⁰ and under the plurality view,³⁷¹ which prevails in New York,³⁷² a harmful non-riparian use is unreasonable as a matter of law. In two states use for municipal supply has been held to be an unreasonable exercise of a riparian privilege,³⁷³ a position which New York appears to approve,³⁷⁴ though it has never done so expressly, and which could be justified on the ground that it is more reasonable to spread the cost of municipal supply over its numerous beneficiaries by water charges or by taxation than by depriving private riparians of their water use privileges without compensation.³⁷⁵ In another state it has been held that diversion of water for municipal supply without compensation cannot be justified as a valid exercise of the police power;³⁷⁶ a conclusion consistent with the principle that where private property is taken for the benefit of a public enterprise, rather than to further the public interest in the equitable adjustment of rights and privileges as between private parties, eminent domain rather than the police power must be resorted to.³⁷⁷ And finally it should be borne in mind that in states such as New York in which uncompensated preemption of lakes and streams with privately owned beds for municipal supply is already unlawful,³⁷⁸ any risk that the recommended statute might be interpreted as intending to legalize such preemption can be eliminated by including in the statute a provision similar to the one embodied in sec. 429-o of the New York Harmful Use Bill:³⁷⁹ viz., that the statute shall not be construed as increasing the rights or privileges of the state or of its subdivisions in bodies of water.

Also unfounded is a fear expressed by a New York administrative body with jurisdiction in an important area of the water field that the enactment in New York of a statute legalizing substantially harmful diversions of lake or stream water when reasonable would undercut New York's legal position in the pending action brought by New York and certain other Great Lakes states to enjoin agencies of the state of Illinois from continuing their diversion of Lake Michigan water into the Mississippi watershed to

the great damage of New York and her citizens, because if New York contended, as her administrative agency apparently wishes her to do, that Illinois could not justify her substantially harmful diversions on the ground that they are reasonable, Illinois could reply that New York was in no position to make such a contention after having enacted a statute legalizing substantially harmful diversions within her own borders when reasonable under all the circumstances.

It seems highly unlikely, however, that the U.S. Supreme Court would give any appreciable weight to such a reply from Illinois, even if New York during the pendency of the Lake Michigan diversion litigation should enact such a statute. That court has in several cases made it abundantly clear that when litigation between states concerning their respective water rights comes before it, the outcome will not depend in the main on what rules may be prevailing in the litigating states in regard to the rights and privileges of their private citizens among themselves with respect to uses of, or alterations in, or diversions from the lakes and streams within their own borders.³⁸⁰

Specially pertinent in this connection is *Connecticut v. Massachusetts*³⁸¹ in which it appeared that Massachusetts proposed to divert water from certain tributaries of the Connecticut River to augment Boston's water supply; and that Connecticut sought to enjoin this diversion on the ground that it would constitute a violation of her riparian rights under the common law prevailing both in Connecticut and Massachusetts. The court denied the injunction, and said *inter alia*:

"Connecticut suggests that, under the common law in force in both States, each riparian has a vested right in the use of the flowing waters and is entitled to have them to flow as they were wont, unimpaired as to quantity and uncontaminated as to quality. It maintains that the taking of waters from the Ware and Swift infringes vested property rights in that State which cannot be taken without its consent against the will of the owners. And it insists that this Court, following the law enforced by each of the States within its own boundaries, should grant injunction against any diversion from the watersheds of these rivers.

"But the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented...

"For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right Kansas v. Colorado, 185 U.S. 125,146. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in Kansas v. Colorado, 206 U.S. 48,100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system,' and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters Wyoming v. Colorado, 259 U.S. 419,465,470."

If the U.S. Supreme Court would allow Massachusetts, though applying the riparian doctrine to local disputes over water, to act in contravention of that doctrine despite the objection of a neighboring state, because on all the facts the diversion proposed by Massachusetts was found to be proper, it would seem clear that that court would prevent Illinois' withdrawals from Lake Michigan, regardless of New York's local law, if on all the

facts the Illinois withdrawals were found to be improper. Consistent with this conclusion is the following statement in Colorado v. Kansas:³⁸²

"The lower State is not entitled to have the stream flow as it would in nature regardless of need or use. If, then, the upper State is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both States, is whether, and to what extent, her action injures the lower State and her citizens by depriving them of a like, or an equally valuable, beneficial use...And in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted."

Also worthy of attention is New Jersey v. New York³⁸³ in which it was held, despite New Jersey's claim of violation of her riparian rights, that New York could divert a limited amount of water from the Delaware River. The court said:

"The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the states concerned. Missouri v. Illinois, 200 U.S. 496,526. Wyoming v. Colorado, 259 U.S. 419,466. Connecticut v. Massachusetts, 282 U.S. 660,671." ³⁸³

If it be assumed, as does the New York administrative body whose apprehensions are the subject of discussion, that the New York common law prevailing when New Jersey v. New York was decided forbade diversions of water from streams,³⁸⁴ the decision clearly shows that New York's position vis a vis New Jersey was not prejudiced by the inconsistency between the privilege it asked for and its own common law. Indeed it would seem that the request for permission to divert which New York made in the action

brought against her by New Jersey would constitute more of an embarrassment to New York in the Lake Michigan diversion litigation than the existence of a rule, whether common law or statutory, for application within her borders, that substantially harmful diversions are lawful if reasonable under all the circumstances. But however that may be, it is clear in view of the utterances of the U.S. Supreme Court quoted above and of the holdings cited that New York's position in the Lake Michigan diversion litigation with Illinois will not be appreciably weakened either by the claim of a privilege to divert which New York made in *New Jersey v. New York*, or by any rule as to substantially harmful diversions by her own citizens which she might decide to enact.³⁸⁵

In view of the foregoing considerations and of the probability that a riparian owner objecting to an alteration of a lake or stream will usually be far more concerned with the extent of the harm caused him than with whether or not it was inflicted upon him by an act which is classified as a diversion in his state, it is to be hoped that the provision in subd. (2) of sec. 429-m of the New York Harmful Use Bill³⁸⁶ that no harmful alteration³⁸⁷ in a body of water shall be held unlawful merely because it constitutes a diversion of the water will ultimately meet with the approval of the New York legislature; and that a similar provision will be adopted in other states in which there is doubt as to the legality of harmful diversions, or in which, as in New Jersey³⁸⁸ and Pennsylvania³⁸⁹ they appear to be unlawful at the present time.

Another question in regard to New York riparian law which stands unanswered today is the following. Assuming that the New York law is that substantially harmful alterations in bodies of water are in general lawful if reasonable,³⁹⁰ and that substantially harmful impoundments of lake or stream water for short periods of time to facilitate the generation of power is lawful when reasonable,³⁹¹ have the New York courts established an exception to the first rule and imposed a limitation on the scope of the second by virtue of which impoundments of lake or stream water for long periods of time are unreasonable as a matter of law and therefore illegal? Pointing toward an affirmative answer to this question

is *Clinton v. Myers*³⁹² in which the court held, apparently as a matter of law, that it was wrongful for an upper riparian owner to detain enough water to propel machinery which required more water for its operation than the stream furnished in its ordinary stages. The court added that the right, claimed by the upper owner,

"to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, aqua currit, etc."³⁹³

As to the upper owner's assertion that his detention of the water not only did no material injury to the lower owner but actually made his power more valuable the court said:

"The answer to this is, that he must be the judge whether he will accept of any such benefit. He is entitled to the water and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer."³⁹⁴

On the other hand, in *Strobel v. Kerr Salt Co.*³⁹⁵ the court suggested that a defendant sued for unreasonably large withdrawals of stream water for the manufacture of salt might avoid liability in the future by the construction of a reservoir to accumulate water when it was plentiful for use in times of scarcity, and so neutralize the diminution in flow due to use for salt manufacture; and that on a retrial of the action, the court might condition the withholding of an injunction against the defendant on its construction of such a reservoir. Since it can be argued that the court would not have proposed that the defendant undertake seasonal storage of stream water if the court had believed such storage to be unlawful, it can also be argued that *Strobel* tends to support the legality of such storage, despite the failure of the court to discuss that point or to cite *Clinton* in connection with it, although its awareness of that case is established by its citation of it to sustain the proposition that priority of use is relevant to the issue of reasonableness.³⁹⁶

Also apparently taking the position that seasonal storage of stream water to achieve uniformity of flow is not necessarily unlawful is the following statement from the opinion in *Fulton County Gas & Electric Co. v. Rockwood Mfg. Co.*,³⁹⁷ made without explanation of its relation to *Clinton*, and indeed without any reference whatever to that case, although it had been cited in the briefs of the parties:

"It is said, however, that this judgment gives to the plaintiff...the right to maintain its dam as now constructed at Peck's lake. The defendant counterclaimed by asking an injunction against the plaintiff from the maintenance of this dam at Peck's lake and the storing of water as therein accomplished by the plaintiff. This was denied. The denial, we take it, is based upon the facts found that the natural flow of the stream was 100 cubic feet per second or 150 cubic feet per second and that this had not been interfered with by the plaintiff. We do not deem this judgment to have gone so far as to determine ultimately the rights of the respective parties regarding the storage or the amount of storage in Peck's lake. The defendant is not now making use of the water as riparian owner. Whenever it attempts to make reasonable use of Caroga creek as a riparian owner the question as to the storage in Peck's lake may become important and material... What the subsequent rights of the parties may be when the defendant establishes a plant or attempts to make practical use of the water as a riparian owner must of necessity be dependent upon the circumstances and conditions as they then develop, and the use which the defendant attempts to make."

In view of *Clinton*, *Strobel* and *Fulton* it would seem that the New York law as to the legality of seasonal storage of lake or stream water is presently in an uncertain state.

In the course of a description of the common law riparian doctrine rules now prevailing in the eastern states a leading authority in the area recently stated that "the extent to which and in what manner water

may be stored from high-flow to low-flow periods...is not clear."³⁹⁸ This statement is borne out not only by the New York cases just referred to but also by the apparent absence of any clear and explicit authority on this point in several other eastern states. Evidence of the lack of such authority is afforded by the absence of citations to cases involving long-term water storage in recent articles and reports on the water law of Connecticut,³⁹⁹ North Carolina,⁴⁰⁰ Pennsylvania⁴⁰¹ and of New England in general;⁴⁰² and by statements that as there is no express authority for such storage in Illinois, and as long-term storage could conflict with the natural flow theory, the Illinois law as to its legality is uncertain.⁴⁰³

There are, it is true, a few eastern judicial opinions which could possibly be interpreted as relevant to the question. Thus *Koopman v. Blodgett*⁴⁰⁴ might be read as indicating that long-term storage would be unreasonable as a matter of law, if harmful; even though the case was decided in Michigan where the reasonable use version of the riparian doctrine prevails⁴⁰⁵ under which other types of alterations in stream flow can be held reasonable and lawful, even though harmful.⁴⁰⁶ *Wheeler v. Ahl*⁴⁰⁷ might be construed as pointing toward the conclusion that long-term storage could be lawful, if reasonable, because the court held for a defendant sued for damage caused by storing enough water for machinery which required more than the stream's normal flow for its operation; but an argument that the case does not go so far as to support the legality of long-term storage could be based on the fact that defendant's storage, though substantially harmful, was never for more than a few days at a time. It would not be difficult to read *Gould v. Boston Duck Co.*⁴⁰⁸ as the Massachusetts counterpart of *Clinton v. Myers*;⁴⁰⁹ but *Tourtellot v. Phelps*⁴¹⁰ and *Mason v. Whitney*⁴¹¹ could be interpreted as indicating that the legality of long-term storage would, like that of any other kind of stream alteration, be determined by a consideration of all the circumstances, and that long-term storage would not, therefore, be singled out for specially restrictive treatment. Indeed, these few cases, though possibly relevant to the issue at hand, do not really come to grips with it, and seem to have the effect of emphasizing rather than of diminishing the existing uncertainty⁴¹² as does the possibility that alterations

involving long-term storage might in some states be classified and treated as diversions of a lake or stream, the legality of which under existing law is to a large extent uncertain, as pointed out above.⁴¹³

For reasons set forth in the next and immediately succeeding paragraphs it would seem advisable for states having a common law rule that substantially harmful impoundments of lake or stream water can not be made lawful by proof that they are reasonable under all the circumstances to repeal that rule by statute, and for states in which uncertainty exists as to the legality of substantially harmful but reasonable impoundments to resolve it in favor of their legality by legislation. The statute should, however, be so worded as to continue the present common law rule that an impoundment causing harmful flooding of land above it is unlawful and that the defendant can not urge the reasonableness of such an impoundment as a defense.⁴¹⁴ While it is proper to legalize harmless flooding⁴¹⁵ as sec. 15-0701 of the New York Environmental Conservation Law has done,⁴¹⁶ it would be going too far to permit harmful flooding to be legalized by a plea of reasonableness. Accordingly sec. 429-o of the New York Harmful Use Bill expressly provides that nothing in the bill shall be construed as increasing the number of instances in which it is now lawful for a person to cause the dry land of another to be so covered or permeated with water that harm to its owner results.⁴¹⁷ Flooding involves a trespass⁴¹⁸ a violation of a landowner's right to freedom from intrusion;⁴¹⁹ and to make it possible for one guilty of such an intrusion to escape liability for it, even when it is harmful, would seem to conflict to too great an extent with the widely entertained and deeply rooted conviction that a landowner should be as completely secure in the possession of his land as is consistent with the common good, and that the security of possession of individual landowners is in the long run not only consistent with but in furtherance of the common good. Some measure of the strength of this conviction is afforded by the cases holding that not even the juggernaut known as the federal navigation power can relieve the federal government from the obligation to make compensation when it floods dry land of a riparian owner in the execution of a project for the improvement of navigation.⁴²⁰

On the other hand, substantial harm caused by impoundments which do not involve a trespass by flooding would not seem to be open to an objection so basic. Thus seasonal impoundment of stream water might quite properly be found reasonable, although causing substantial harm to a riparian owner by depriving him of the fertility which would otherwise have been added to his riparian land by spring floods, if it appeared that under the conditions prevailing along the stream involved, it was more important that the stream flow be stabilized than that the riparian owner objecting to the impoundment be able to rely on the stream for enriching deposits as before. While he is harmed by the deprivation, the harm is not exacerbated by a violation of the security of his possession.⁴²¹

The enactment of a statute providing that substantially harmful impoundments are lawful when reasonable would not, of course, require judgment in favor of the impounding defendant in every case resembling the one just supposed. Demonstrating the truth of this statement is the well known case of *U.S. v. Gerlach Live Stock Co.*⁴²² which in effect held that under conditions prevailing in California it was reasonable for a riparian owner to insist on annual fertilization of his land by floods, and unreasonable for the government so to impound water as to interfere with such fertilization. On the other hand, the enactment of such a statute would at least remove any doubt that a court might have as to its power to hold in accord with *Joslin v. Marin Municipal Water District*⁴²³ that in the absence of proof that the public interest requires that the supply of sand, gravel and rock be conserved and available to the public in commercial quantities, it was unreasonable for a riparian owner to insist that the normal flow of a stream be unimpeded in order that it might deposit on plaintiff's land the usual amount of such material, although impoundment of the stream was necessary to the creation of an adequate municipal water supply.⁴²⁴

In most eastern states a different result would probably have been reached at common law in a case like *Joslin*, and without consideration of the question as to whether substantially harmful impoundments could be lawful if reasonable: for the plaintiff could successfully attack the use for municipal supply as illegal because non-riparian and harmful,⁴²⁵

or as an unreasonable exercise of a riparian privilege.⁴²⁶ Moreover, if the defendant should seek shelter under the variability principle of the riparian doctrine⁴²⁷ it would probably be denied him on the ground that that principle is available only to parties using water for the benefit of riparian land,⁴²⁸ unless the state adheres to the minority rule legalizing harmful non-riparian uses if they are reasonable under all the circumstances.⁴²⁹ And the plaintiff would be in the same advantageous position under any statute legalizing substantially harmful alterations which provided that it should not be construed as increasing the rights as to water of the state or its subdivisions.⁴³⁰ The defendant in *Joslin* was not, of course, vulnerable to attack on the ground that its use was non-riparian; for its water right was appropriative and therefore lawfully exercisable for the benefit of non-riparian land.⁴³¹ If, however, the defendant in *Joslin* had been a private party impounding water for agricultural or industrial use on riparian land, the outcome under eastern riparian doctrine water law would depend on whether or not a substantially harmful impoundment could be lawful if reasonable, and, if it could, on whether or not the impoundment involved in the particular case was reasonable under all the circumstances if due weight were given to the variability principle.⁴³² Under legislation legalizing as between private parties substantially harmful impoundments when reasonable, only the second of these questions would have to be answered. And this would seem to be a desirable situation. If most kinds of substantially harmful alterations in lakes and streams can be lawful if reasonable, it would seem to follow that substantially harmful impoundments should occupy the same position when reasonable.

For reasons stated when discussing the advisability of legalizing substantially harmful but reasonable changes in the location or course of bodies of water, legislation legalizing substantially harmful but reasonable impoundments need not under present conditions be feared as authorizing alterations in the natural condition of a body of water which for all practical purposes would have to be viewed as permanent obstacles to changes called for by new conditions in the watershed,⁴³³ or as increasing the number of instances in which the state or its political

subdivisions could deprive private riparian owners of their water supplies without compensation when procuring water for public consumption.⁴³⁴ While impoundment of water in surface reservoirs, because of evaporation losses,⁴³⁵ may not always be the best method of conserving water available in times of plenty for use in times of shortage,⁴³⁶ under present conditions storage of some sort is indispensable,⁴³⁷ and there are undoubtedly situations in which surface storage still constitutes the preferable alternative.⁴³⁸ It should, therefore, be made clear by legislation that impoundments, though substantially harmful, are lawful if reasonable under all the circumstances.

The need for legislation in the seasonal impoundment field has already been recognized in several states by the enactment of statutes legalizing seasonal storage in varying degrees and subject to various conditions.⁴³⁹ There appears to be but one state, however, having legislation which might be construed as authorizing a substantially harmful impoundment if it were reasonable under all the circumstances.⁴⁴⁰ Some of the few eastern statutes permitting impoundments require the maintenance of average or normal stream flow below the impoundment,⁴⁴¹ and so will probably discourage the construction in the states in which they are in force of many impoundments which would cause substantial harm to downstream riparian owners; a result which will no doubt tend to reduce considerably the practical importance in those states of the presence or absence of legislation dealing expressly with the legality of substantially harmful but reasonable impoundments.

But if, as seems likely, the provisions requiring maintenance of stream flow or lake level have been included in the statutes authorizing impoundments for the protection of lower riparian owners as well as for the protection of the public interest in the preservation of the natural condition of lakes and streams, they are open to the criticism that they amount to the enactment of a rule that any impoundment that reduces stream flow or lake level below the prescribed limit is unreasonable as a matter of law when the rights of riparian owners below the impoundment are in issue, even when harmless and *a fortiori* when harmful; a rule which is more consistent with the much criticized natural flow version of the riparian doctrine⁴⁴² than with the reasonable use version of that doctrine

under which substantially harmful alterations in bodies of water will be lawful if reasonable.⁴⁴³ While the existence of such a rule would permit the arrival at a satisfactory conclusion in some cases, it would preclude the desirable decision in those in which the impounder should succeed because his water storage was reasonable under all the circumstances despite the harm it caused to lower riparian owners.

Another question in regard to New York riparian law to which it is difficult to give a definite answer at the present time is the following. Assuming for the sake of argument that the New York law has been and still is that substantially harmful alterations in bodies of water are in general lawful if reasonable,⁴⁴⁴ has an exception to this rule been created under which a harmful alteration in a body of water effected by the addition of foreign water⁴⁴⁵ thereto is always unlawful and can never be legalized by proof that it was a reasonable alteration under all the circumstances? Pointing toward an affirmative answer to this question is the following dictum uttered in *Waffle v. New York Central Rr. Co.*:

"The evidence did not show that the ditches made by the defendant diverted water into the stream upon which the plaintiff's⁴⁴⁶ saw-mill was situated, which had any other outlet than into such creek. Had that been proved, and that the plaintiff sustained an injury from an increased quantity flowing in the stream he would have been entitled to recover therefor."⁴⁴⁷

The following dictum from *McCormick v. Horan* is in accord:

"But the right to the use of a water-course for the discharge of surface or other water exists only in respect of waters of which the water-course is the natural outlet, and it does not justify the diversion and turning of the water of one stream into another, not its natural channel, thereby subjecting lands on the stream into which the diversion is made to the servitude or easement of a water-way for the water thus discharged into it."⁴⁴⁸

Also in accord is the following dictum uttered by the court in *Matter of Gillespie* (Esopus Creek Section No. 1) after it had pointed out that the City of New York was adding large quantities of foreign water to a stream:

"The city has been a trespasser upon the lands of the riparian owners in so far as the daily 687,000,000 gallons of water has increased the depth and width of the Esopus creek."⁴⁴⁹

As the New York courts do not appear to have rendered any holdings or made any statements which conflict with these dicta, it might be argued that there is no uncertainty as to the New York rule as to the legality of harmful additions of foreign water to lakes or streams. This position would, however, seem to be untenable. The common law is made by decisions rather than by dicta.⁴⁵⁰ Moreover, while subsequent court decisions sometimes make dicta into law by following them, especially when uttered by the Court of Appeals,⁴⁵¹ they sometimes destroy their force by ignoring or rejecting them. It follows that the New York law on the point under consideration will be in an uncertain state until the courts render a decision on it or until clarifying legislation is enacted. Tending to support this conclusion is the not unlikely possibility that a court faced today with the question as to the legality of harmful additions of foreign water might conclude that the necessity for such additions for the purpose of transferring water from one watershed to another had increased to such an extent⁴⁵² that these restrictive dicta should not be given the force of law under existing conditions; a position which the court would be entirely free to take, since under the doctrine of precedent, mere dicta have no binding force.⁴⁵³

Such holdings in other eastern states as have come to the author's attention are to the effect that harmful addition of foreign water to a lake or stream is unreasonable as a matter of law and therefore illegal. Thus in *Mayor and City Council of Baltimore v. Appold* in which the court assumed the truth of the plaintiff's allegation that the addition by the defendant of foreign water to a stream traversing the plaintiff's land would cause him substantial harm, and affirmed the injunction granted against the defendant below, the court said:

"In this case, the appellant proposes to empty into 'Roland's Run' an artificial stream of water, to the extent of ten million gallons in every twenty-four hours. It can hardly be contended that such a user is consistent with the common enjoyment of the stream by all other riparian owners...the necessary consequence would be, not only to affect the quantity and increase the natural current of the stream, but in fact to change the character and nature of the stream itself. Such a use cannot be said to be incident to the reasonable user of a stream; on the contrary, it goes beyond the natural right to which the appellant, in common with all other proprietors, is entitled, and being an unreasonable and unauthorized use of the stream - an action would lie, even though he might not have suffered any actual damage."⁴⁵⁴

In *Merritt v. Parker*⁴⁵⁵ and *Tillotson v. Smith*⁴⁵⁶ the courts went further and by actually holding in accord with the above quoted dictum in *Mayor of Baltimore* that even harmless additions of foreign water are actionable, made it clear that a substantially harmful addition must necessarily be unreasonable as a matter of law and therefore illegal. Thus in three eastern states there would appear to be no uncertainty as to what the rule is on the point under consideration.

There are, however, a few eastern states in which the state of the law in regard to the addition of foreign water to lakes and streams appears to be substantially that prevailing in New York. That is, while the courts in these states have rendered no decisions on the point, they have uttered dicta which either indicate expressly or could easily be construed as indicating, that additions of foreign water would be unlawful. Thus in *Leitch v. Sanitary District of Chicago* the court said:

"A riparian owner is one who owns land bordering upon a running stream, and he has the right to the flow of its water as a natural incident of his estate, and it cannot lawfully be diverted, increased, diminished or polluted against his consent."⁴⁵⁷

See also *Barnard v. Sherley* in which the court, anticipating the possibility that its decision might be misconstrued as legalizing the addition of foreign water, spoke as follows:

"We do not wish to be understood as holding that appellants were authorized, by artificial means, to conduct the waters from their spring into the stream upon appellee's land, unless the said waters would have naturally flowed into said stream without artificial aid;..."⁴⁵⁸

And in *Jackman v. Arlington Mills* the court declared:

"It seems to be settled that one riparian landowner has no right to turn into a natural watercourse another stream, or surface water which does not naturally flow into it, in such quantities as to so increase the volume of water in the watercourse that substantial injury is thereby done to a riparian landowner lower down."⁴⁵⁹

While the courts which made the statements just quoted apparently have never rendered holding or uttered dicta conflicting with them, it would, for the reasons stated when commenting on the relevant dicta of the New York courts,⁴⁶⁰ seem proper to conclude that uncertainty in regard to the legality of additions of foreign water exists in Illinois, Indiana⁴⁶¹ and Massachusetts. And if there are any states whose courts have never spoken on the subject at all, they should, of course, be counted as members of the group of states whose law on the point is uncertain.

Reversal of the rule prevailing in New Hampshire, New Jersey and Maryland that harmful additions of foreign water cannot be justified by demonstration of their reasonableness, and elimination of the uncertainty on this point existing in New York and other eastern states by the enactment of legislation declaring that alterations in the natural condition of bodies of water effected by substantially harmful additions of foreign water are lawful if reasonable under all the circumstances, as does the New York Harmful Use Bill,⁴⁶² would seem to be an advisable measure^{462a}. A rule which prohibits substantially harmful additions of foreign water, even when reasonable, like a rule which prohibits substantially harmful seasonal storage of lake or stream water even when reasonable,

is a more logical constituent of the undesirable natural flow version of the riparian doctrine than of the preferable reasonable use version of that doctrine.⁴⁶³ Moreover retention of such a rule may in some cases prevent the court from imposing on the parties to a water rights dispute a physical solution involving the addition of foreign water, although such solution would be in furtherance of the public interest and reasonable as between the parties despite the harm it might cause to one or both.⁴⁶⁴

Of course, any state which goes no farther than to legalize harmless additions of foreign water, as New York has already done,⁴⁶⁵ would be taking an important step in the right direction; for it would seem quite nonsensical to compel a man wishing to transport water for a beneficial use to go to the trouble and expense of constructing a ditch to carry it when it could be moved harmlessly by adding it to a lake or stream.⁴⁶⁶ There are, moreover, many lakes and streams to which foreign water could be added to the substantial benefit of the party adding it and without harm to anyone else. Many bodies of water have high banks; and while to raise the level of a body of water so as to cause a part of its bank which, because of its height was formerly dry to be covered by water would constitute a flooding of the upper part of the bank's face, such flooding would in many of the cases in which it occurred be harmless.⁴⁶⁷ Again, the need for the addition of foreign water is most likely to arise when water levels or flow are below normal, and when there would therefore be ample room for the addition of foreign water without flooding.

But if a state decides to go farther and to legalize substantially harmful additions of foreign water if reasonable, should it go to the length of legalizing such additions if they cause harmful floods? The reasons which support the conclusion previously stated that it would be inadvisable to permit impoundments causing harmful flooding to be justified under a plea of reasonableness support the conclusion that it would be unwise to allow additions of foreign water causing harmful flooding to be justified under such a plea;⁴⁶⁸ and the New York Harmful Use Bill would not do so if enacted.⁴⁶⁹ This conclusion also derives considerable support from western court decisions and legislation governing the legality of

additions of foreign water. The western common law rule is that such additions are unlawful if they cause harmful flooding;⁴⁷⁰ and some of the statutes authorizing the addition of foreign water to lakes and streams as a means of transporting it or for other purposes include provisions to the same effect.⁴⁷¹

Since if any harm at all is caused by an addition of foreign water it is likely to be the result of flooding, it could be argued, of course, that legislation authorizing substantially harmful additions of foreign water, except those causing flooding, would have little practical significance, and that the statute books should not be cumbered with it. It can be pointed out on the other hand that it is quite conceivable that situations might be encountered in which the addition of foreign water to a lake or stream might cause substantial harm otherwise than by flooding, and in which the addition of foreign water should be held lawful if found to be reasonable under all the circumstances. Thus a man whose farm is traversed by a stream might be substantially harmed by an increase in its depth which interfered with his passage across the stream from one part of his farm to another; and if this increase in depth occurred during the dry season, the added water might not have raised the level of the stream above its normal high water mark, with the consequence that the harm could not be attributed to flooding. A court might well conclude in such a case that it would not be unreasonable to allow the addition of foreign water to continue, leaving it to the farmer to avoid the harm by constructing a bridge, or if the defendant were willing to construct a bridge, to deny an injunction against the addition of the foreign water if the farmer should refuse to allow the defendant to enter on his land and construct one; the choice between these alternatives to depend on all the circumstances in the case.⁴⁷² Again, it is conceivable that an increase in stream level, though causing no flooding because not raising it above normal high watermark, could inflict harm by covering the strip of land between the normal low and high watermarks, of which strip a farmer had been making profitable use during the dry season. The legality of the addition of water in such a case should depend, it would seem, on the reasonableness of the addition in the light

of all the facts, including the needs of the defendant and the effect of the addition on the objecting party; and should not arbitrarily be held illegal simply because the alteration in the stream effected by the defendant had been brought about in a particular manner. It would seem therefore that while the need for the legalization of harmless additions of foreign water lakes and streams is more urgent than the need for the legalization of substantially harmful but reasonable additions of foreign water which do not cause flooding, the benefits which might be derived from the latter step are large enough to provide justification for taking it.

Sec. 3. Uncertainty as to the Relevance of the Public Interest When Determining Reasonableness.

Because of the scarcity of judicial authority the New York riparian law is uncertain on yet another important point: viz., whether a trier of fact, when passing on the reasonableness of competing water-connected activities, can take into account their relative importance to the public. If cases in which the New York courts have taken that importance into account when deciding whether or not a defendant clearly liable at law for damages should be enjoined from continuing his wrongful conduct⁴⁷³ are offered in support of an affirmative answer to this question, they could be rejected on the ground that while it may be entirely proper to take the public interest into account when deciding whether or not injunctive relief is appropriate,⁴⁷⁴ it does not necessarily follow that the public interest can be allowed to influence the result when deciding whether or not a defendant's activity has rendered him liable in damages because it was unreasonable,⁴⁷⁵ and that these cases do not purport to pass on that point.

*Strobel v. Kerr Salt Co.*⁴⁷⁶ appears to be the only New York case which comes sufficiently close to deciding the issue at hand to have an appreciable bearing upon it^{476a}. In this case it appeared that the defendant in the course of its salt making operation was causing substantial harm to the plaintiffs by reducing the flow of and polluting a stream running through their lands on which they were carrying on various manufacturing enterprises; that although the plaintiffs sought an injunction rather

than damages, which they intended to sue for later,⁴⁷⁷ the trial court dismissed the complaint not because it found that injunctive relief would be inappropriate, but rather on the ground that the defendant was making a reasonable and lawful use of the stream which infringed no rights of the plaintiffs;⁴⁷⁸ that the trial court relied on *Pennsylvania Coal Co. v. Sanderson*⁴⁷⁹ as authority for its conclusion; and that the Court of Appeals, reversing the judgment below, held defendant's conduct unreasonable as a matter of law.⁴⁸⁰ In explanation of this action the Court of Appeals pointed out that it was held in *Sanderson* that

"the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners...must ex necessitate give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal."; ⁴⁸¹

stated that

"We have never adopted that rule in this state and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interest of some business required to develop the resources of the state, and in which much capital had embarked, giving employment to a great number of people."; ⁴⁸²

and added that

"While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise." ⁴⁸³

It is possible, of course, to construe the holding and statements in Strobel as establishing a rule that when the reasonableness of a water-based activity is in issue, the relative importance to the public of the activities of the contesting parties will not be considered. It could be argued that the rejection of Sanderson by the New York court involved the disapproval of the Pennsylvania court's election in Sanderson to take account of the "interests of the community" when passing on the reasonableness issue. On the other hand, it will be noted that the court's statement in Strobel that there was "no public necessity"⁴⁸⁴ for adopting the Sanderson approach, affords some basis for the inference that if public necessity were established in some future case, and that if the defendant's activity were shown to be of sufficiently greater importance to the public than the plaintiff's, the court might turn to the Sanderson doctrine.

Also having a bearing on the interpretation of Strobel are two probabilities: (1) that since the court's opinion contains no reference to any evidence offered to show that the defendant's salt making was of greater public importance in New York than the miscellaneous manufacturing activities of the plaintiffs, the question as to the relevance of a comparison of the public importance of the activities of the plaintiffs and defendant when passing on the issue of reasonableness was never actually before the court in that case; and (2) that such a demonstration, if attempted in Strobel, would almost certainly have failed, since the salt industry has never played the important role in the New York economy which coal mining did in Pennsylvania for so many years. In the light of these probabilities it could be argued that Strobel stands for no more than the obviously sound proposition that a defendant cannot establish the reasonableness of his activity as against a group of plaintiffs merely by showing that his investment and payroll are of such magnitude as to have considerable public importance;⁴⁸⁵ and that if he hopes to win by stressing the extent to which his activity is identified with the public interest, he must show that it is more essential thereto than the activities of his adversaries.⁴⁸⁶

Further doubt that the court could have meant to hold in Strobel that the relative importance to the public of the litigants' activities cannot be taken into account when passing on the reasonableness issue in a case involving alteration of the natural condition of a body of water is furnished by the holding in Booth v. Rome, Watertown & Ogdensburg Terminal Rr. Co.⁴⁸⁷ and by the reasons given for it. In this case it appeared that defendant's blasting to prepare its land for use jarred the neighboring premises of plaintiff to such an extent as to damage his house. In arriving at a holding that a judgment for damages rendered in favor of the plaintiff by the court below could not be affirmed on the theory that the defendant had been guilty of nuisance - that is, with having interfered to an unreasonable extent with the plaintiff's enjoyment of his land - the court took account of the importance to the public of the activity on defendant's land which was served by the blasting as well as the importance of the plaintiff's activity on his land.⁴⁸⁸ It seems quite unlikely that the court which decided Strobel was unacquainted with the Booth case⁴⁸⁹ or entertained the opinion that its doctrine would be inapplicable to a case merely because it involved a question as to the reasonableness of the use of a stream rather than a question as to the reasonableness of the use of a tract of land. It also seems unlikely that a New York court, if confronted by a stream pollution case today would fail to realize that pollution cases like blasting cases belong in the nuisance category; and that when the issue is as to the reasonableness of the activities of the contesting parties, the factors determinative of it should be the same in both cases.⁴⁹⁰ Nevertheless, until the New York Court of Appeals has actually held that the relative importance to the public of the activities of parties litigating their riparian rights should be taken into account, the New York law as to the relevance of that factor must be viewed as uncertain in view of the language employed in the Strobel opinion and of the attitude displayed therein to the Sanderson case.⁴⁹¹

The state of the law on the point in Massachusetts has been described as follows:

"A last factor, of most uncertain weight in determining when a water use is 'reasonable', is public policy - the interest of the community in contradistinction to the interests of the litigants. An occasional court has given this as a ground of its decision. The great bulk of cases, however, have been decided without any explicit consideration of anything but the immediate conflict. Since in these cases the issue can never be stated simply as the public versus the private interests, and since opinions will frequently differ as to the result in any given case most conducive to community well-being, it is almost impossible to tell whether the court gave unvoiced consideration to public interest or considered it immaterial to the proper resolution of a private dispute. In one area, however, public policy has been a force shaping the development of the law. The area is that of utilization of stream current for power, which, if the subject matter of the cases is any barometer at all, is (or was) by far its most important use. It is also the one area concerning which there has been significant legislation."⁴⁹²

While search of the law reports of states other than New York, Pennsylvania and Massachusetts does not reveal many judicial declarations as to the relevance to the reasonableness issue of the relative importance to the public of the activities of the litigants in a water rights case, there are at least seven cases, three of which are recent, in which such relevance is affirmed. One is *Montgomery Limestone Co. v. Bearden* in which the court quoted the following from Sanderson:

"These modifications of individual right must be submitted to, in order that the greater good of the public be conserved and promoted.", and said:

"So it is of public importance that the proprietors of useful manufactories should be held responsible only for appreciable injury caused by their works, and not for slight inconveniences or occasional annoyances, or even some degree of interference with irrigation or agriculture."⁴⁹³

Another is *Petraborg v. Zontelli* in which the Minnesota court in affirming a holding that the drainage of half of a lake in furtherance of mining operations was an unreasonable alteration of the lake, said:

"Constructive programs have been formulated looking to the conservation and perpetuation of these God-given resources, which offer scenic and piscatorial advantages to our citizens and to an increasing number of sojourners from all parts of the country."⁴⁹⁴

See also *Mizell v. McGowan* in which the North Carolina court held that it was lawful for a riparian owner to drain surface water from his land into a stream in excess of its carrying capacity, although causing substantial harm to lower riparian owners, and said in support of its holding:

"Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right."⁴⁹⁵

And in *Board of Drainage Commissioners of Drainage District No. 10 v. Board of Drainage Commissioners of Washington County*⁴⁹⁶ the Mississippi court rendered a holding in accord with that in *Mizell* and wrote an opinion which as a whole shows that it took into account the interests of all of the people of the state as well as those of the litigants when passing upon the reasonableness of defendant's conduct. A declaration of the relevance of the public interest is found moreover in the recent case of *Thompson v. Enz* in which it was said:

"The trial court should keep in mind the following factors in determining whether the use would be reasonable:...Third, it is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights

and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation."⁴⁹⁷

And finally there are recent decisions in two western states in which the appropriation and riparian doctrines are concurrently in force that affirm the relevance of the public interest when passing upon the issue of reasonableness.⁴⁹⁸

Of course there are a few cases taking an attitude toward the Sanderson doctrine quite comparable to that displayed by the New York court in the Strobel case. Thus in Columbus & Hocking Coal & Iron Co. the Ohio court said:

"Nor is it of consequence that the operation of the company's mines tends to the development of the natural resources of the country. But few enterprises, the product of which is useful, fail to advance the general good."⁴⁹⁹

And in Panther Coal Co. v. Looney, the Virginia court's comment on the Sanderson case was as follows:

"That decision, as it seems to us, is based upon two grounds, neither of which is sound, viz.: That the rights of one riparian owner are to be determined by the necessities of another and by the importance of the latter's business to the community or public....Courts have no policies, and cannot permit consequences to influence their judgment further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them."⁵⁰⁰

Inasmuch as there is doubt in New York at the present time as to whether the relative importance to the public of the water-connected activities of parties litigating their riparian privileges and rights should be taken into account when passing upon the reasonableness of their activities,⁵⁰¹ it would seem to be advisable to resolve it by legislation answering the question in the affirmative, as does sec. 429-m of the New York Harmful Use Bill.⁵⁰² Similar action might well

be taken in other eastern states; particularly in any state whose courts, like those of Virginia, have explicitly answered the question in the negative.⁵⁰³ Moreover, the adoption of such legislation would appear to be desirable in states whose courts have made statements which could be construed as answering the question in the affirmative but which do not do so unmistakably;⁵⁰⁴ and even in states whose courts, like those of Massachusetts⁵⁰⁵ and Pennsylvania,⁵⁰⁶ have spoken clearly in the affirmative; for in no one of the states whose law reports have been sampled by the author, does there appear to be any judicial opinion in which the question has been given thorough consideration, nor a quantity of judicial utterance on the question large enough to warrant an assumption that the question has been definitely settled. In any jurisdiction concerning whose case law on the question these statements are true, there would be a risk that a negative answer might be given to it in conformity with the position taken on it by the United States Supreme Court in *Arizona Copper Co. v. Gillespie*⁵⁰⁷ because of the deference paid by the state courts to the decisions of the highest federal court, even in cases in which the state courts are not legally bound by them.

It may be asked, of course, whether the injection of a comparison of the importance to the public of the activities of the parties into a dispute between private riparian owners as to the extent of their riparian privileges and rights as among themselves can be justified. For several reasons it is submitted that an affirmative answer should be given to this question. While, as has been previously pointed out, cases holding that this factor can be taken into account when passing upon the appropriateness of injunctive relief cannot be cited as holding that this factor can be taken into account when passing on the reasonableness of the activities of the parties in an action for damages,⁵⁰⁸ it is submitted that cases of the former type⁵⁰⁹ furnish at least analogical support for recognition of the relevance of the factor in cases of the latter type, even though the point at issue in damage actions is the very existence of a privilege or right rather than merely the nature and extent of the relief to be given by the court in compensation for a violation of or to prevent infringement of a privilege or right the existence of which has been established. The following statement would appear to be sound:

"Ultimately, the questions of 'right' and 'wrong' must always be decided by reference to community standards and requirements - social, economic, and moral - in short, by reference to a shifting utility. And this should be true whether the 'wrong' is to be restrained by injunction or only made the basis for compensation in damages."⁵¹⁰

Still stronger analogical support for the position that the relative importance to the public of the activities of the parties is relevant to the reasonableness issue in a damage action involving riparian privileges and rights is afforded by the apparently regular recognition of the relevance of this factor in actions for damages for uses of a defendant's land alleged to interfere unreasonably with the plaintiff's enjoyment of his land.⁵¹¹ There would seem to be no cogent reason for taking a different position in cases involving alterations in or uses of bodies of water,⁵¹² or indeed in any case, regardless of the nature of the rights involved. Thus Holmes said many years ago:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis."⁵¹³

This statement as to the influence which public policy has and should have on the creation of legal rules by judicial action would appear to be applicable to the role which public policy does and should play in the decision of particular cases. It is submitted therefore that the legislatures should make it clear to the courts that they have no objection to their giving weight to public policy in water cases in which

the public interest is often so great, and to encourage them to do so explicitly so that those concerned with water rights will know that the public interest is one of the factors which will be taken into account when passing on the reasonableness issue in water litigation^{513a}.

The experience in the west in regard to the public interest and the reaction of the legislatures of the western states to this experience are quite illuminating. Under the prior appropriation system of water rights in its original form the only essentials to the acquisition of a water right were the availability of water not already appropriated and and appropriation of the water by its devotion to a use beneficial to the appropriator.⁵¹⁴ There was no requirement that his use be consistent with the public interest. In other words, it appears to have been assumed that what was good for the appropriator was good for the public as well. Ultimately it was realized that in certain situations this assumption was false: that appropriators had been obtaining water for uses which, though undoubtedly beneficial to them, were not as beneficial to the public in the long run as other uses would have been.⁵¹⁵ To remedy this situation legislation has been enacted in the great majority of the states in which the prior appropriation doctrine is recognized providing in substance that a person seeking to secure an appropriative water right must obtain from a designated state agency a permit to take water, and that no permit can be granted for a use which would be contrary to the public interest.⁵¹⁶ It is important to note that these permit statutes have been interpreted as authorizing the state agency to select from competing water projects, each of which judged by itself would be beneficial to the public to some degree, the one which in its judgment would produce the greater public benefit.⁵¹⁷

Under the orthodox formulation of the reasonable use version of the riparian doctrine the courts are subject to a duty and possess a power substantially comparable to the duty imposed on and the power granted with respect to the relevance of the public interest to the state permit agencies by the western permit legislation: viz., a power to take into account the relative public importance of the water-based activities of the litigating riparian owners when passing on the issue of

reasonableness;⁵¹⁸ and it is submitted that legislation should be enacted in the eastern states eliminating any doubt which might now exist as to the courts' duty and power in this respect. It can be argued, of course, that there are so many different kinds of water-based activities of substantially equal public importance that there would be very few cases involving only private parties in which one of them would be able to establish that his activity was of greater importance to the public than his adversary's, and that legislation requiring consideration of the public interest when passing on the reasonableness issue in such cases would therefore have so little practical significance that its enactment would not be worth while. Although this argument has considerable force, it would nevertheless seem advisable to require the courts to consider the relative importance to the public of the activities of the litigants, and to give weight to a difference in that importance when one can be established, even if such establishment can be accomplished only infrequently. Tending to support this conclusion is the apparent absence of any movement in the west to enact legislation depriving the state permit officers or agencies of the power they presently have to prefer one applicant over another on the ground of the public interest, even though occasion for the exercise of that power has thus far seldom arisen.⁵¹⁹

Moreover, as competition for available water becomes sharper, the number of cases which can properly be decided on the basis of the public interest will probably be greater than at present.⁵²⁰ And it seems likely that in view of the currently increasing recognition of the need for the formulation of master water plans for river basins, states and regions embracing several states, which plans would sometimes exhibit a preference for one water use over another in the area subject thereto, the number of instances in which one water-based activity could be found to have substantially greater public importance than another would be considerably increased. Relevant at this point is the observation that the power to choose between competing water projects the one which promises the greater public benefit contains the seeds of a greater power - the power to subordinate individual water projects to a master plan.⁵²¹

But would forced consideration of the public interest when passing upon the issue of reasonableness result in the infliction of unreasonable hardship on private riparian owners whose existing water-based activities might be found to be in conflict with the master plan? For example would consideration of the public interest improve the present position of a municipality or other governmental unit when litigating with a private riparian the legality of heavy withdrawals from a body of water for public supply or of the discharge of large amounts of sewage into a stream which it began to make because such withdrawal or discharge was provided for in the master plan? For the reasons offered in support of the conclusion that legalization of substantially harmful diversions from bodies of water, if reasonable, would not increase the power which New York State already has to subject private riparians to uncompensated loss of their water supplies to governmental bodies,⁵²² the first branch of this question can be answered in the negative; and such an answer can be given to its second branch as well. The sovereign power which the state possesses over lakes and streams, the beds of which it owns, is broader than the recommended statute would confer upon it.⁵²³ If the lake or stream involved were one to which the state's sovereign power did not extend, because its bed was privately owned,⁵²⁴ the discharge of sewage into it by a municipality would be held unlawful in New York,⁵²⁵ as elsewhere.⁵²⁶ This conclusion has been justified on the ground that such discharge is an unreasonable use of the stream,⁵²⁷ which is not excused by the urgent public need for sewage outlets.⁵²⁸ It can be further supported by the argument that when the sewage discharge is for the benefit of many persons residing in a municipality possessing the power of eminent domain, it is more reasonable to relegate the municipality to that power and to the collection of the funds by taxation to compensate for the harm caused by the pollution discharge, thus spreading the cost over so many people that it would not throw a heavy burden on any of them, than to inflict on a relatively small number of private riparians the severe losses which they might suffer if deprived of their water supply.⁵²⁹ It has also been held that the use of a stream as an outlet for municipal sewage and waste constitutes a taking of riparian rights⁵³⁰ that cannot be justified as a valid exercise

of the police power;⁵³¹ a conclusion consistent with the principle that where private property is taken for the benefit of a public enterprise, rather than to further the public interest in the equitable adjustment of rights and privileges as between private parties, eminent domain rather than the police power must be resorted to.⁵³² And finally it should be noted that in states such as New York in which uncompensated preemption of a stream as an outlet for municipal sewage and waste is presently unlawful,⁵³³ any risk that the recommended statute might be interpreted as intending to legalize such preemption as against a private riparian owner can be eliminated by including in the statute a provision similar to the one embodied in sec. 429-o of the New York Harmful Use Bill: viz., that the statute shall not be construed as increasing the rights or privileges of the state or of its subdivisions in bodies of water.⁵³⁴ And finally it should be borne in mind that under the legislation advocated the public interest would not be given a necessarily decisive role, but would be merely one of several factors to be taken into account when passing on the reasonableness issue.

Recognition of the need for legislation to protect the public interest in lakes and streams has not, of course, been confined to the western states. In New York and other eastern states statutes have been enacted which prohibit alterations in the natural condition of bodies of water by changes in their banks or beds,⁵³⁵ or by withdrawals of water,⁵³⁶ or by the introduction of degrading substances⁵³⁷ without obtaining the approval of a designated state official or agency. Among the many chapters of such legislation currently in force in New York are those containing sec. 1230 of the Public Health Law making a permit from the Commissioner of Health prerequisite to the use of any new outlet for the discharge of sewage or industrial waste into the waters of the state; sec. 15-0701 of the Environmental Conservation Law making a permit from the Water Resources Commission prerequisite to a change in or disturbance of the course, channel or bed of a stream and to the removal of sand, gravel and other materials from its bed or banks; sec. 450 of the Environmental Conservation Law making approval of the same body prerequisite to the use of water for public supply; and sec. 476 of the same law making approval of the same body prerequisite to the withdrawal of underground water on Long Island.

It is submitted, however, that although these and similar sections in the New York statute books play a valuable role in the protection of the public interest in New York waters, their combined scope is not sufficiently broad to ensure consideration of the public interest in all situations in which it would be desirable to have that factor taken into account. This insufficient protection of the public interest in New York is referable to two facts. In the first place, since the existing New York permit legislation does not expressly purport, like that in the western states, to apply to substantially all important water uses, some such uses as, for example, use for irrigation and use for industrial supply, apparently can be made in New York without a permit,⁵³⁸ and thus without consideration by any state body of their compatability with the public interest, unless an action is brought against the party making such a use by a party harmed by it on the ground that it is unreasonable as against him, and unless the court rules that the public interest must be taken into account when passing on the reasonableness issue.

In the second place, some of the existing New York permit statutes are so worded and interpreted that it is possible for the question as to whether a permittee will be liable in damages for the harm he causes another riparian owner by the exercise of his permit to be decided without consideration of the public interest, even though, as already pointed out, it is sometimes as important that the public interest be taken into account when the issue is liability in damages as when the issue is the appropriateness of injunctive relief.⁵³⁹ Thus while the New York permit statutes generally require a permit agency to take the public interest into account when passing on permit applications,⁵⁴⁰ they contain no provision requiring a court to do so if a party who is harmed by the exercise of the permit brings a court action against the permittee; an action in which he can obtain damages if he can show that the exercise of the permit violates one of his common law riparian rights.⁵⁴¹ It follows that even in cases falling within the scope of the permit statutes it is not certain whether or not the public interest will be taken into account when the claim for damages of the party harmed is passed on; for as already pointed out, the New York common law as to the necessity of so doing is uncertain.⁵⁴²

It is submitted, therefore, that despite the several permit statutes now in force in New York, it would be advisable for the New York legislature to enact sec. 429-m of the Harmful Use Bill which would require the courts, when passing on the reasonableness issue in a water rights case, to consider the relative importance to the public of the primary purpose to be served by the alterations effected or intended or by the activities carried on or intended by the contesting parties in or on the body of water involved in the litigation whenever this factor appeared to have relevance.⁵⁴³ And such legislation might well be enacted in any other eastern state in which the riparian doctrine is still in force, and in which certain important uses of water can be made without state permit,⁵⁴⁴ or in which parties harmed by the exercise of a state water use permit can maintain actions in the courts to recover compensation for such harm.⁵⁴⁵

Such legislation would, of course, be of little practical value unless a court had available to it evidence from competent witnesses on which it could base its conclusion as to with which of the contesting parties the public interest lay. The likelihood that such evidence would be available could be appreciably increased by legislation providing that any party to the litigation could, upon obtaining the approval of the court, summon as witnesses such state officials and employees as could reasonably be presumed to possess the relevant knowledge, without becoming liable for the payment of witness fees or mileage allowances; and authorizing the court to summon such witnesses on its own motion, if the parties failed to do so and if the court believed that their testimony should be taken.⁵⁴⁶ The likelihood that the essential evidence would be available could be further increased by legislation requiring copies of the pleadings in all litigation involving a contest over water rights to which the Water Resources Commission had not been made a party to be served on the commission and authorizing it to appear in the case on behalf of the state if in the commission's judgment the public interest would be served by its appearance.⁵⁴⁸ While such legislation might impose an appreciable financial burden on the state, because if state officials and employees were often called upon as witnesses, the state might find it necessary to increase their number, it would seem advisable for the

for the state to accept this burden in view of the importance to the public of the satisfactory decision of court actions involving the allocation and use of the water resources of the state.^{548a}

Sec. 4. Uncertainty as to the Effect of Malicious Motive on the Reasonableness and Legality of an Alteration in or Use of a Body of Water.

Another uncertainty which exists in New York riparian law is as to the effect of malicious motive on the reasonableness and legality of an alteration in or use of a body of water. If L and U owns tracts of land riparian to a stream; if L's tract lies downstream from U's; if L has been withdrawing a reasonable amount of water for irrigation of his tract; if U thereafter begins to divert an amount of water for the irrigation of his riparian land which, though large enough to cause some harm to L, does not exceed U's proper share in view of the respective needs of himself and L,⁵⁴⁹ can L in an action against U for damages and an injunction, for the purpose of establishing that U's use is unreasonable and unlawful, introduce evidence tending to show that U hates him and is embarking on his irrigation enterprise in order to gratify that hatred? Or if U is the first irrigator, and L when he subsequently begins to irrigate, finds that he is harmed by the size of U's withdrawals, and brings an action against U for damages and an injunction, can U, by way of defense and for the purpose of showing that L's claim is unreasonable and non-maintainable,⁵⁶⁰ introduce evidence tending to show that L bears him ill will and is choosing to irrigate in order to cause U harm? As far as the author is aware the New York courts have never been squarely confronted with either of these questions or with questions substantially similar, which could be put in over-simplified form as follows. Can a defendant be held liable in a case involving riparian rights because of his malice? Can a plaintiff in such a case be barred from relief by his malicious motives?

There have, however, been a few New York court decisions and judicial utterances which can be cited as having at least some bearing on these questions. Thus it was held in *Phelps v. Nowlen*⁵⁶¹ that a defendant on whose land there was a spring surrounded by an embankment of uncertain origin was not liable to his neighbor, the plaintiff, for the lowering of the water in plaintiff's well which resulted when defendant cut a ditch through the embankment and lowered the water in his spring, even though he did so with the expectation that his act would have an adverse effect upon the plaintiff's well. The court said:

Strictly speaking, such an act is but a vindication of what the law sanctions, and, of itself, furnishes no just ground for complaint. It may have been lawfully done, by the defendant, to prevent a diversion of water, the use of which he claimed, and which if allowed to continue, by lapse of time, might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully⁵⁶² appropriated by another, the intent cannot well be considered as malicious, or the purpose a wrongful one...a party is not barred from the vindication of a legal right because he is actuated by an improper motive."⁵⁶³

The court also quoted with approval the following statement from *Pickard v. Collins*:⁵⁶⁴

"Bad motives in doing an act which violates no legal right of another cannot make that act a ground of action."

While because of the court's conclusion in *Phelps* that since the defendant may have acted to protect himself against the acquisition by the plaintiff of a prescriptive right to the higher water level in his well⁵⁶⁵ his intent could not be classified as malicious, *Phelps* obviously cannot be cited as holding that a bad motive cannot make an otherwise lawful act illegal, the last sentence of the court's own statement and the court's quotation from *Pickard* tend to support the inference that if the court had actually

been faced with a case in which the defendant had been motivated by malice it would have held that it would not render him liable if he would not have been liable apart from it.⁵⁶⁶

There are, however, two later water rights cases decided by the New York Court of Appeals which could be construed without undue strain as intimating that an act which would be legal if properly motivated would be illegal if done to gratify malice. In *Forbell v. City of New York* the court, after holding defendant liable for harm caused the plaintiff by its use of percolating water on land other than the tract on which it had sunk its wells,⁵⁶⁷ undertook to indicate what withdrawals of percolating water would be lawful, though harmful to an adjoining land owner, and said:

"In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of other, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to use, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or whatever else the land as land may serve."⁵⁶⁸

It could be argued that in expressing approval of all takings of percolating water to further the use of defendant's land as land the court by implication withheld its approval from malicious withdrawals which would gratify the defendant's ill will rather than aid in the use of his land as land. Legalization of malicious withdrawals would seem clearly inconsistent with the standard of reasonableness which the court had decided should be controlling.

Again, in *Kossoff v. Rathgeb-Walsh, Inc.* the Court of Appeals, in support of its holding that it was lawful for the defendant to raise the grade of its lot, although this act caused surface water to flow onto the plaintiff's lot to his damage, pointed out that upper and lower owners

"have equal rights to improve their properties, come what may to the surface water, provided, of course, that the improvements are made in good faith to fit the property to some rational use to which it is adapted...No question of fact is presented concerning whether defendants made this improvement in good faith. There is no suggestion that defendant Grant made a long-term lease with the Texas Company merely as a vindictive gesture against the plaintiff, or that the Texas Company in adapting the lot to its business did anything different from what is done in case of any other gas station."⁵⁶⁹

It could be argued that the court would not have taken the trouble to show that there was no element of malice in the case, if it had not assumed that proof of malice might have required a different result.

Moreover, in *Beardsley v. Kilmer*,⁵⁷⁰ a case involving interests other than privileges and rights with respect to water, the Court of Appeals by conceding that some harmful acts which would be lawful if properly motivated could be held unlawful if their sole motivation was malicious, took a position inconsistent with the view that motive is immaterial if the act complained of being lawful⁵⁷¹ and appeared to have doubt as to whether that view ever was law in New York.⁵⁷²

Whether or not *Beardsley* and other New York cases admitting that the motive for an act can affect its legality⁵⁷³ may be looked upon as having established a rule for cases involving interests in water is doubtful. In *Beardsley* and in the cases in accord with it, interests such as those of business and labor have been at issue. Since the attitude of the courts toward the relation between motive and liability has varied, the court's choice of position appearing to depend at least in part on the sort of interest which the defendant is alleged to have violated,⁵⁷⁴ it could not be assumed with confidence that the courts would apply in the water field a rule which had been evolved in other fields. Moreover, *Forbell* and *Kossoff*, in which interests in water were involved, merely intimate rather than expressly declare that motive can be taken into account when passing on the reasonableness and legality of

alterations in or uses of bodies of water. It is submitted therefore that the present New York law on this point is indeed uncertain.

When turning to the effect of a plaintiff's malice toward the defendant on the plaintiff's power to enforce a right which the court conceded would clearly be his if his insistence upon it were not actuated by malice, it should be noted that it was held in *Clinton v. Myers*⁵⁷⁵ that it was lawful for a riparian farmer to open the gates of a dam built by a mill owner to stabilize the flow of a stream.⁵⁷⁶ The primary reason for the court's conclusion appeared to be the court's belief that the mill owner's claim of a privilege to detain until the dry season such water of the stream as he did not require for immediate use had no foundation in law in view of the fact that the mill machinery required more water for its operation than was supplied by the ordinary flow of the stream.⁵⁷⁷ The court also appeared to be influenced by the probability, though it did not expressly so find, that the farmer might be harmed rather than benefitted by the stabilization of flow, because it deprived him of the normal high level of the stream in the spring which was specially useful to him in that season when a lull in his farm work would give him time to run his sawmill. The court's statement in this regard was as follows:

"He is entitled to the water and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer."⁵⁷⁸

and seems to justify the inference that the court gave weight to the existence of the probability referred to. To the mill owner's contention that the farmer was insisting on his right to the natural flow of the stream from a bad motive and for the purpose of annoying the mill owner, the court, though conceding that the trial court had made a finding to that effect, replied:

"This is immaterial. Courts have no power to deny to a party his legal right, because it disapproves his motives for insisting upon it."⁵⁷⁹

Thus while the court, if it had felt free to set aside the trial court's finding as to malice, could have easily disposed of the mill owner's claim

in that regard by adverting to the farmer's probable need for high water in the early spring, it apparently chose to avoid any question as to whether it had jurisdiction to reverse the finding of fact made below by taking the position that a plaintiff's actuation by malice cannot in any event bar him from the enforcement of a right. As to whether in view of the foregoing the statement of the court last quoted above should be treated as an actual holding or as mere dictum reasonable men might well differ.⁵⁸⁰

Another case having some bearing on the question as to the effect of plaintiff's malice on his power to enforce a right is *Morris v. Tuthill*⁵⁸¹ in which it appeared that the plaintiff sought foreclosure of a mortgage; that the defendant mortgagor in his answer alleged inter alia that the plaintiff and his assignor, with intent to injure the defendant, had acted in concert to hinder him in his effort to refinance the mortgage; that their slander of defendant's title had caused a bank to refuse a loan to defendant with which to pay off the mortgage; that these allegations of the defendant's answer were ordered stricken by the courts below; and that the defendant appealed from that order. In affirming it the Court of Appeals said:

"The facts stated in the second answer of the appellant as amended, unexplained and uncontradicted, might justify the inference that the plaintiff and the former holders and owners of the mortgages in suit have acted in concert, with a view unnecessarily to harass and oppress the appellant, and with intent to prevent the payment of the amounts due upon the securities, to the end that the equity of redemption might be foreclosed, and they become the purchasers of the fee of the property for less than its value. But they do not tend to show that the mortgages have been satisfied or that the full amount claimed is not due thereon, or that the plaintiff is not the legal holder and owner, and entitled to maintain this action. The proceedings for the foreclosure by advertisement, and the means taken to obstruct and embarrass the appellant

in his efforts to raise the money to redeem his property and prevent the sale, may be laid out of view, as these proceedings were discontinued. The motives of the former owners of the mortgages in selling, or of the plaintiffs in buying them, are not material, and the appellant has no concern with the consideration of the assignment. It is sufficient that the mortgage debt is due, and has been transferred to and is now owned by the plaintiff. He may have bought it from motives of malice toward the defendant and solely with a view to sue upon them, and the former owner from a like motive may have transferred them without consideration, but this would not constitute a defense to the action. The appellant can only arrest the action by paying the amount due, or tendering the same and bringing it into court."⁵⁸²

Morris, then, appears to be a holding that what the defendant referred to as the plaintiff's intent to injure him and the court referred to as plaintiff's malice, would not defeat the foreclosure action of a plaintiff who was obviously motivated by hope of financial gain as well as by malice. In view of the plaintiff's mixed motivation, the court's statement that his malice would not be material, even if it were his sole motive, must be treated as dictum. It should be noted, moreover, that the court did not purport to be announcing principles which would be generally applicable to all actions regardless of their subject matter, and that its language warrants the inference that its attention was centered on debtor-creditor situations.

Townsend v. Bell,⁵⁸³ to which reference has previously been made,⁵⁸⁴ is another case to which attention should be given in this connection, although the extent of its relevance and its force as a precedent are no easier to determine than the precise meaning and effect of Clinton. In Townsend it appeared that the plaintiff outbid the defendant at a sale of a riparian tract downstream from defendant's, paying an inflated price for it, although he did not intend to use it himself, in the hope of forcing the defendant to rent it from him in order to escape liability for

discharging discolored water into the stream from a mill on the riparian tract which the defendant already owned. The plaintiff's suit for an injunction against such discharge was dismissed by the trial court. This judgment was, however, reversed on appeal by the General Term, that court holding in substance that defendant's discoloration of the water was unreasonable as a matter of law; and that the plaintiff was entitled to injunctive relief despite the purpose for which he had acquired his riparian tract. The Court of Appeals said:

"Further, it is alleged that plaintiff's motive in purchasing the land was bad. That is immaterial. 'Courts have no power to deny to a party his legal right, because it disapproves his motives for insisting upon it.' (Clinton v. Myers...) The plaintiff had a right to buy the land, whatever his motives were. When he became the owner he took all the rights of an owner. One of these was to have the water of the stream unpolluted."⁵⁸⁵

It will be noted that although the subject of the court's consideration was the plaintiff's allegedly bad motive (acquisitive or extortionary) rather than any malice toward the plaintiff, the court cited Clinton as an authority; a case in which the trial court had found that the party seeking by self help to enforce his right to an unstabilized natural flow of the stream was actuated by malice against his adversary, the mill owner who had stabilized it. Thus unless a desire to gain financially at the expense of the defendant can be equated in New York with malice toward the defendant, which seems unlikely in view of the tolerant attitude toward acquisitive desire displayed in Morris and other New York cases,⁵⁸⁶ there is no holding in Townsend in regard to the effect of a plaintiff's malice toward the defendant on the plaintiff's power to enforce a right. On the other hand the citation of and quotation from Clinton in Townsend might be looked upon as the equivalent of a dictum expressing approval of the pronouncement in Clinton that a defendant cannot prevent a plaintiff from enforcing his right merely by proof that the plaintiff in suing was actuated by malice toward the defendant.

It would seem then that the New York law as to whether proof that the plaintiff's motive in bringing an action to enforce a water right is to

gratify his malice against the defendant will enable the defendant to obtain judgment in his favor is uncertain. *Morris*, in which the plaintiff was successful even though the court assumed *arguendo* that the plaintiff was so actuated, was a debtor and creditor rather than a water rights case; and, as already pointed out, it cannot safely be assumed that a rule established in one field in regard to the relevance of malice will be carried over into another area by the courts. While *Clinton* and *Townsend* are water rights cases, in each of them, for reasons pointed out above, it is unclear whether the court rendered a holding or uttered a mere dictum against the relevance of the plaintiff's malice toward the defendant.⁵⁸⁷

But even if after a study of the sparse and ambiguous New York authority on the basic questions as to the effect of a defendant's or plaintiff's malice toward his adversary on the privileges or rights with respect to water of the maliciously actuated party it be concluded that the malice must be taken into account, the question remains as to whether this is true in every instance, or only when malice constitutes the principle motivation or the sole motivation. On this question there appears to be no clear New York authority at all in the water rights field. An examination of the statements quoted above from the opinions in *Forbell* and *Kossoff*⁵⁸⁸ might lead some to the conclusion that a party's malice toward his adversary should not, any more than any other of the numerous factors relevant to the issue of reasonableness, be overlooked in any case, regardless of the degree of influence it appeared to have on the conduct of the malicious party. On the other hand, it should be noted that in *Great Atlantic and Pacific Tea Co., Inc. v. New York World's Fair 1964-1965 Corporation*⁵⁸⁹ the court held that if it were to assume, contrary to its belief, that the New York statute which in substance forbids the erection of a fence above ten feet high to cut off air and light from a neighbor, but expressly provides that a landowner may improve his land by the erection of any structure thereon in good faith applied to a screen of artificial shrubbery which the defendant planned to erect in such a position that it would cut off the view of a sign erected by the plaintiff, the defendant would not be liable for the harm which plaintiff might suffer as a result of the screen because

"the defendant has convinced the court that the screen which is intended to be erected is being erected in good faith and solely for the purpose of protecting the esthetic value of the fair grounds."⁵⁹⁰

The court then went on to express in the following terms its views as to what the applicable law would be had it appeared that the defendant had been actuated by malice against the plaintiff:

"However, assuming that this were a case of mixed motives on the part of the defendant corporation, viz., malice toward plaintiff and a bona fide desire to cut down any possible damage to the beauty of the fair, even then, under the authorities, the plaintiff has no cause of action. (Beardsley v. Kilmer, 236 N.Y. 80) In the last-cited case, at page 89 of the opinion, the court said: 'But as we have pointed out we are compelled to disagree with plaintiff's view that the acts complained of were solely the conception and birth of malicious motives and when we do this and decide that there are also legitimate purposes the rule seems to be perfectly well established that there is no liability.'⁵⁹¹

As the A & P case falls in the field of nuisance in which riparian rights cases also lie,⁵⁹² it might well be looked upon by a court confronted with a riparian rights case as sufficiently analogous to such a case to be decisive of it, despite the fact that A & P involves a statutory rather than a common law right. Because of the failure of the New York spite fence statute to point out how much malice on the part of the defendant is needed to negate his claim of good faith, an action against the defendant based on the statute presents a question very similar to one of those facing the court when the action is founded on the theory that the defendant is guilty of common law nuisance because he has with malice toward the plaintiff interfered with his enjoyment of a lake or stream; viz., how much malice on the part of the defendant is necessary before it can be held to have affected his legal position? Thus A & P supplies a dictum tending to support the view that in any case falling in the field of nuisance the defendant's malice toward the plaintiff will not render him liable if he

would not have been apart from his malice, unless malice was his only motivation. This, moreover, is the position which has been taken by the New York courts quite regularly in cases involving business and labor interests since the decision in *Beardsley* relied on in *A & P* as decisive authority.⁵⁹³

Of course, it must not be forgotten that in *Morris* the court uttered a dictum that not even a plaintiff who was actuated solely by malice toward the defendant would for that reason be barred from enforcing his right.⁵⁹⁴ But as it was quite evident that the plaintiff in *Morris* was motivated by hope of financial gain, even if he were also motivated by malice toward the defendant as the court assumed *arguendo*, it follows that what the court said as to the irrelevance of solely malicious motivation could rank no higher than dictum; and its rank for the purpose in hand is lowered even further by the fact already adverted to that the court appeared to be directing its attention to debtor-creditor cases only. In view of the foregoing it would seem that while it is quite unlikely that the New York courts would apply the *Morris* dictum to a riparian rights case, and while in view of *Beardsley* and *A & P* it is entirely conceivable that they would hold that the malice toward an adversary of a party to such a case would not diminish the riparian privileges or rights of the maliciously motivated party unless he were solely actuated by malice, it is not clear that they would so hold, as these cases do not involve riparian interests. It is submitted therefore that the New York law on the question as to how much malice must be shown adversely to affect the riparian privileges or rights of a claimant of such interests is at present uncertain.

Such investigation as the author has made of the law in the other eastern riparian doctrine states as to the effect on riparian privileges and rights of proof of the malice of their claimant toward his adversary has led him to believe that in several of these states the law on that point is unclear, though perhaps not to the extent that it is in New York. This seems to be the situation in Maine where it was held in *Stevens v. Kelley*⁵⁹⁵ that a cause of action was stated by a complaint which alleged that a riparian defendant who, though not operating his mill, released

water from his power dam maliciously and for the purpose of spoiling the ice crop which the plaintiff riparian had hoped to harvest from the pond created by the dam. The court said:

"In Phillips v. Sherman... it is said, 'a wanton or vexatious, or unnecessary detention, would render the mill owner so detaining, liable in damages to those injured by such unlawful detention.' If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it to the injury of owners above or below...The case of Chesley v. King, 74 Maine, 164, in the principles involved, is substantially like this. There, the defendant, in digging a well upon his own land, destroyed the plaintiff's spring by drawing from it the water which percolated through the earth and thus supplied the spring. In that case it was held...that the defendant, though in the exercise of a right and would not be liable to an action so long as he acts in good faith and with an honest purpose, yet he would be liable if he dug the well for the sole purpose of inflicting damage upon the party who has rights in the spring. The case at bar would seem to be a stronger one for the plaintiff. In this the defendants have only a qualified interest in the water, a right to use it for a specified purpose only; and in the use bound to exercise due care in regard to the rights of others. Yet in the act complained of they were not in the use of the water for their own legal purposes..."⁵⁹⁶

In view of the statements quoted it is not clear whether Stevens should be interpreted as holding that a harmful alteration in stream flow actuated solely by malice is unlawful and that malice is established by defendant's failure to show a useful purpose, or as holding that where such an alteration serves no useful purpose, it is unlawful, regardless of malice, because unreasonable. The court's reference to Chesley, in which emphasis was put on the fact that defendant was actuated solely by malice, tends

somewhat to support the first alternative. But even assuming that this is the correct one, Stevens affords no answer to the question as to the legality of a harmful alteration which the defendant makes for two reasons: (1) because it actually aids him in carrying on his water-based activity; and (2) because he entertains malice toward the plaintiff. It should be noted, however, that it was held in *Lord v. Langdon*⁵⁹⁷ that a defendant whose dominant motive was found by the jury to be malicious, was guilty of a violation of the Maine spite fence statute, which declares that any fence above eight feet in height which is maliciously maintained shall be deemed a private nuisance, but is silent as to the degree of malice which the plaintiff must prove in order to make out his case. This would seem to afford analogical support for the conclusion that a riparian defendant who harms the plaintiff by an alteration of a body of water will be liable even though he is actuated merely primarily rather than solely by malice, because, as pointed out in Stevens, a riparian defendant charged with the alteration of a stream in which he has only a qualified interest, is in an even weaker position with respect to the effect of his malice on his legal position than a defendant charged with sinking a harmful well. It would seem to follow that a riparian defendant should be held to be in at least as weak a position with respect to malice as the builder of a fence who, like the digger of a well, owns the situs of his activity. But even if it be conceded that this line of reasoning has appreciable force, the Maine law on the point under consideration is in fact uncertain unless a Maine court has squarely passed upon it; and the author has not found any case in which the court has done so.

The state of the law in Massachusetts as to the effect on a party's riparian privileges and rights of his malice toward his adversary seems to be somewhat similar to that existing in Maine. Thus in *Taft v. Bridgeton Worsted Co.*⁵⁹⁸ in which a riparian defendant was sued by a riparian plaintiff for the damage done to the plaintiff's ice crop by the defendant's release of the water behind its dam, the supreme court held that it was not error for the trial court to have refused to direct a verdict for the defendant in view of evidence which warranted the jury in finding that the defendant's sole purpose in releasing the water was to prevent the plaintiff

from harvesting ice. In support of its holding the court referred to its reasoning when the case was before it earlier and the question was as to whether the complaint stated a cause of action. On this occasion the court said:

"The allegations of the first count are to the effect that malice and a purpose to injure the plaintiffs was the sole motive by which the defendant was actuated. That is the equivalent of an allegation of an unreasonable use of the water."⁵⁹⁹

This statement can, of course, be taken as a holding that a harmful alteration in stream flow actuated solely by malice is unreasonable as a matter of law and is therefore unlawful; and has been so interpreted by learned authors.⁶⁰⁰ But the reasoning in the earlier opinion dealt also with the question as to the effect on defendant's riparian privileges of his malice toward the plaintiff when the defendant was also actuated by worthy motives. The court said:

"There are intimations by way of dicta in some of our decisions to the effect that the rights of an owner in the use of his land are not absolute but are limited so that acts arising from pure malignity and spite toward his neighbor, unmixed with a genuine purpose to improve his estate, may render him liable...There are other decisions which throw doubt upon the proposition that in such case liability of the landowner can spring merely from the motive with which an act is done and which, done with a benignant design, would not involve the owner in any liability. The notion that the extent of the rights of a landowner can depend upon the motive with which he acted was said not to be well founded in the common law by Mr. Justice Holmes in Rideout v. Knox, 148 Mass. 368, who at page 372, conceded 'that to a large extent the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation...The case at bar stands upon a different footing. For the purposes of this case it is

not necessary to discuss it nor to determine its limitations. The defendant, although the owner of the dam, gate, sluiceways and mill, was not the owner of the water impounded in the pond. It had no right of exclusive appropriation and dominion over it. The only property interest in flowing water is usufructuary... In the case at bar the plaintiffs as riparian owners had the right to harvest the ice upon the pond, subject only to the right of the defendant to use the water in a reasonable way in connection with the operation of its mill. Their probable ice harvest was wholly subject to the right of the defendant reasonably to use the flow of the stream in connection with its mill. The right of the defendant for that end was dominant and that of the plaintiffs was entirely subservient to that end. But the right of the plaintiffs was not subject to the whim, caprice or malice of the defendant in appropriation of the water...While this right is somewhat precarious, it is not wholly nebulous...It is a right secure against irrational conduct of another whose only right in the water is usufructuary and not absolute...If it should turn out at the trial that, although that evil motive existed, nevertheless the use made by the defendant of the water was reasonable..., then the plaintiffs cannot recover. The exercise by the defendant of its right as riparian owner in a rational manner cannot subject it to legal liability although at the same time the injury thereby wrought to the plaintiffs may gratify its ill will."⁶⁰¹

Can this language be read as impliedly though not expressly recognizing the view that a defendant riparian will be liable for harm caused by his alteration or use of a stream if his activity is motivated predominantly by malice? It would seem that it can be so read, if it be noted that despite the statements quoted from Holmes' opinion in *Rideout*, he actually held in that case that the Massachusetts spite fence statute was constitutional and that a defendant whose motive in erecting his fence was only predominantly rather than solely malicious could be held liable under the statute; and if it be remembered that in *Taft* the court, as did the Maine

court in Stevens, pointed out that a riparian's interest in stream water is less complete than the interest of a man in the land he owns, thus laying the foundation for at least as severe treatment of a riparian defendant charged with malice as of a landowner similarly charged. While it is true that there is no express reference in Taft to predominantly malicious motivation, and that the court's basic position is that even when he is malicious, a riparian defendant will not be liable unless his conduct is unreasonable, it seems possible to argue that the court has left room for the view that conduct which would be reasonable if motivated solely by the desire to further the defendant riparian's water-based activity can become unreasonable if predominantly motivated by his malice toward the plaintiff, since the proof of his predominating malice casts grave doubt on the importance to the defendant of the purposes which he claims he acted to serve, and hence on the reasonableness of his conduct.⁶⁰²

It should also be noted that such an interpretation of the Taft opinion could find analogical support in *Robitaille v. Morse* in which the court said:

"The defendants had a right to build up their own business for 'their own selfish gain and profit' and no legal responsibility necessarily resulted from their acts or conduct in doing this, even though as an incident to the accomplishment of their purpose and object it was a necessary result that the plaintiff should be forced out of business...An illegal primary object or purpose is not made out under the law simply because one of the purposes in seeking to secure a trade advantage by a combination is the destruction and ruin of the business of another. It is necessary that such a purpose should be the primary object of the combination entered into with the malicious intention of damaging the plaintiff..."⁶⁰³

thereby indicating that a defendant who is predominantly actuated by malice when he interferes with the plaintiff's business will be liable for the harm he causes.⁶⁰⁴ But despite the interpretation which conceivably could be put on the Taft opinion as suggested above, and despite the position as to malice taken in *Robitaille*, it is submitted that the Massachusetts law

as to the effect on the privileges of a riparian defendant of his actuation by a predominantly malicious motive is uncertain. The Taft opinion is, of course, susceptible of an interpretation somewhat more literal than and contrary to the one herein offered; and it is by no means certain that the Massachusetts Courts would apply the Robitaille doctrine in the riparian rights field, in view of the tendency of the courts already noted to give more weight to a party's malice in one field than in another.⁶⁰⁵

The random and scanty sampling which the author has made of the authorities in Minnesota and Pennsylvania has led him to a few cases which are relevant to but do not provide certain answers to the question as to the effect of a riparian claimant's malice toward his adversary on the existence and extent of the claimant's riparian privileges and rights. Thus the Minnesota court accompanied its holding in *Stillwater Water Co. v. Farmer*⁶⁰⁶ that the defendant was not privileged harmfully to waste percolating water with the statement that if he did have such a privilege, his motive (as to which there was no finding in the record) would be immaterial.⁶⁰⁷ It could be argued, of course, that it would follow that if it were reasonable apart from motive for a defendant riparian to withdraw a certain amount of water for irrigation, the fact that he would not have done so except for his malice toward the plaintiff would be irrelevant. On the other hand, it could be urged that *Stillwater* indicates substantially the opposite: viz., that a riparian owner would have no privilege to withdraw water, even if he used it for irrigation, if his sole or even predominant motive was to harm the plaintiff; for in that event the water, though applied to irrigation, was being wasted, since its actual use was to serve malice. Some support for the latter point of view is afforded by *Tuttle v. Buck*⁶⁰⁸ in which it was held that a complaint states a cause of action when it alleges that the defendant set up a barber shop for the sole and only purpose of destroying plaintiff's business as a barber, and that the defendant accomplished this purpose. But as neither case involves riparian rights, neither case can be looked upon as furnishing an authoritative answer to any part of the question under consideration.⁶⁰⁹ It could be argued, of course, that because Minnesota was one of the first states to adopt the reasonable use version of the riparian doctrine and

has adhered to it for more than a century,⁶¹⁰ its courts could be expected to follow the rule in regard to the effect of malice set forth in the Torts Restatement which has adopted the reasonable use version: viz.,

"Where the use is made primarily for the purpose of causing harm,...it clearly lacks social value and is unreasonable."⁶¹¹

This argument is, however, scarcely conclusive since, as already pointed out, not every court which adopts the reasonable use version in general is conversant with or intends to adopt all of its constituent rules.⁶¹² Hence it cannot safely be assumed that Minnesota's adoption of the reasonable use version involves its acceptance of that version's rule as to the effect of a riparian owner's malice.

Although the Pennsylvania Supreme Court in the case of *Wheatley v. Baugh*⁶¹³ uttered a dictum substantially to the effect that because water is of such a nature that no one can have an exclusive right in it,⁶¹⁴ the law does not permit a man to be deprived of a stream of water for the mere gratification of malice, and so afforded appreciable basis for the prediction that a riparian defendant who altered or made use of a stream solely to gratify his malice toward the plaintiff would be liable for the harm he caused, it leaves the Pennsylvania law as to the effect of malice in riparian rights cases in an uncertain state, not only because dicta do not constitute binding precedents,⁶¹⁵ but also because the dictum in *Wheatley* seems to deal only with solely malicious motivation and to give no hint as to what the law might be as to the effect of predominantly malicious motivation. While it is true that Pennsylvania's adoption of the Torts Restatement rules with respect to percolating water⁶¹⁶ affords some basis for the expectation that it will ultimately adopt the Torts Restatement rules as to lakes and streams, including the rule as to the effect of malice, as far as the author is aware such adoption has not yet occurred. Whether it will occur, and when, is obviously a speculative matter.⁶¹⁷

Since, then, the New York law as to the effect on the riparian privileges and rights claimed by a plaintiff or defendant of malice which he has exhibited toward an adversary appears to be quite uncertain,⁶¹⁸ it would seem that the New York law in that regard should be clarified by legislation.⁶¹⁹

But granting this, the question remains: what provision in regard to the effect of malice should be embodied in the clarifying statute? A review of the New York cases and those from other states cited above will show that most of them take or could be interpreted as supporting one of three positions: (1) that a harmful act is lawful, even though actuated solely by malice, if it would have been lawful had no malice been established - in brief, that malice is totally irrelevant;⁶²⁰ (2) that a harmful act, though lawful if normally motivated, is unlawful if solely motivated by malice;⁶²¹ and (3) that a harmful act, though lawful if normally motivated, is unlawful if primarily actuated by malice.⁶²² It is submitted that the third of these alternatives, which is the one embodied in the New York Harmful Use Bill, is the best.

The explanations of and the reasons offered in support of the first view: viz., that malice should be treated as totally irrelevant, are not entirely persuasive. The commonly encountered assertion to the substantial effect that courts have no power to deny to a party his legal right because they disapprove his motives for insisting upon it, assumes the affirmative of the very question at issue, which is whether or not a party when actuated by malicious motives, actually has a right harmfully to restrict the activity of his adversary or actually has a privilege to do an act harmful to his adversary.⁶²³ Furthermore, the reluctance of the courts to have the trier of the fact confronted with a difficult inquiry into motive, while understandable, does not justify the complete exclusion of motive from consideration.⁶²⁴ The apparent absence of any movement to change the rule prevalent in some fields that motive can have an effect on the existence or extent of a privilege or right would seem to indicate that inquiry into motive has not proved to be an impossible task. Moreover, it would seem undesirable to bar consideration of motive when proof of it would tend to show that the activity of the maliciously actuated party was not in fact of real importance to him, that a restriction of such activity would cause him little harm, and that the privilege of action claimed by him was therefore unreasonable.⁶²⁵ To be sure, a plaintiff might achieve the same result by proof tending without reference to malice to minimize the importance to the defendant of the privilege he claimed, or by emphasis

on the defendant's failure affirmatively to show the importance to him of such privilege; but it would seem that the trier of the fact could more easily arrive at a sound conclusion as to such importance if it could also consider any evidence as to the defendant's malicious motivation which might be offered. And finally the obvious public interest in the discouragement of malicious activity, with its tendency to culminate in strife and violence,⁶²⁶ would appear to be served by a rule permitting malicious motivation to be taken into account when passing on the reasonableness of an alteration in or use of a body of water.

While the second view: viz., that a harmful act, though lawful if normally motivated, is unlawful if motivated solely by malice, has merit because it purports to take malice into account, as should be done for the reasons stated above, this view has been criticized because the maliciously motivated party is nearly always the only party who can reasonably hope to derive any benefit from it. For the party harmed by the act of a maliciously motivated adversary to profit from this view, he must establish that his adversary is solely motivated by malice; and this is a virtually impossible task, if this second view is interpreted literally and such interpretation is conscientiously adhered to.⁶²⁷ A court which attempts to follow this view finds itself in a dilemma. It must either allow a party primarily actuated by malice to exercise a privilege or enforce a right, even though it realizes that such a result would be undesirable, or it must find, contrary to the actual fact, that the party is actuated solely by malice, although such a maneuver is only too likely to supply ammunition to those who question the integrity of the courts. Pertinent in this connection is *Flaherty v. Moran* in which it appeared that the defendant, desirous of revenge against the plaintiff, erected a fence which cut off air and light from plaintiff's residence. To rebut the plaintiff's claim that the defendant was solely motivated by malice, the defendant pointed out that the fence would prevent residents in plaintiff's house from looking into defendant's house, and that it would supply a support on which the defendant could train vines. Without explaining why these assertions were contrary to fact, the court said that

"It is evident that the fence serves no useful or needful purpose, and was built, and is now being maintained, out of pure malice and spite." ⁶²⁸

Because the fence was already serving one useful purpose and was capable of serving another in addition to the furtherance of the defendant's malicious purpose, the court's conclusion appears to fly in the face of the facts. Conceding that the result reached in Flaherty was probably desirable because of the extent to which the defendant was actuated by malice, it is submitted that the court should not have been forced to distort the facts in order to arrive at it; and that a court will be more likely to arrive at a desirable result without undesirable resort to fact distortion if it can operate under the third view which, as demonstrated by *Rideout v. Knox* ⁶²⁹ and *Healey v. Spaulding*, ⁶³⁰ enables a court to hold for the harmed party in a case involving mixed motives, even though the defendant's motivation was only primarily rather than solely malicious. While it may be difficult for a jury or court to decide whether or not a party's malice is his primary motive, the difficulty, which is no greater than many others with which triers of fact are accustomed to deal, ⁶³¹ does not seem great enough to outweigh the advantages of the third view.

CHAPTER 5

CODIFYING AND EXCEPTIVE PROVISIONS OF THE HARMFUL USE BILL

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Sec. 1. Provisions of the Harmful Use Bill Codifying Existing New York Law.

In addition to providing for the elimination of some of the many uncertainties in New York riparian law which continue to exist despite the enactment in 1966 of sec. 15-0701 of the Environmental Conservation Law, the Harmful Use Bill includes provisions which in substance codify several of the rules now prevailing in New York with respect to the privileges and rights of riparian owners. Thus subd. (2) of proposed sec. 429-k codifies the well established common law rule adhered to in New York⁶³² that an alteration in the natural condition of a body of water or an activity in connection with it which is both harmful and unreasonable is unlawful, creating in the party harmed by such an alteration or activity a cause of action for damages; and, if the circumstances are appropriate, a cause of action for an injunction.⁶³³

Moreover, the text of subd. (1) of proposed sec. 429-m,⁶³⁴ except for the clause which implies that an alteration in or activity in connection with a body of water may be reasonable and therefore lawful, though causing substantial harm;⁶³⁵ and except for subparagraphs (a) and (g) of paragraph 1 establishing the relevance to the issue of reasonableness of the relative importance to the public of the respective activities of the contesting parties and of the relevance to that issue of their several motives,⁶³⁶ consists of codifying rather than of clarifying provisions. Thus the provision that the question as to whether an alteration in a body

of water or an activity carried on in connection with it is reasonable is one of fact,⁶³⁷ the answer to which may vary with variation in the circumstances,⁶³⁸ is in accord with the New York common law. This statement is also applicable to the provision that when passing on the question of the reasonableness of an alteration in or activity in connection with a body of water, the trier of the fact shall take into account all relevant circumstances, including as many of the following as may have relevance to the particular case:

The relative suitability to the region or to the body of water involved of the alterations effected in it or of the activities carried on in connection with it by the contesting parties, with attention to be paid to the physical characteristics of the lake or stream,⁶³⁹ and to the alterations customarily effected in and to the activities customarily carried on in connection with similar bodies of water in the state.⁶⁴⁰

The amount of harm which would be caused to each of the contesting persons by the recognition or denial of the privileges of alteration or activity respectively claimed by each,⁶⁴¹ but that this circumstance shall not necessarily be decisive.⁶⁴²

The relative availability to the contesting persons of practicable means of minimizing or avoiding the harm resulting from an alteration or activity, with attention to be paid to the cost of resort to such means and to the ability of a contesting person's enterprise to meet such cost.⁶⁴³

The location on the body of water of the points of access thereto of the contesting persons.⁶⁴⁴

The relative priority in time of the commencement of the alterations or activities of the contesting parties, but that this circumstance shall not necessarily be decisive.⁶⁴⁵

Another part of the Harmful Use Bill which, if enacted, would codify existing New York riparian law is subd. (3) of proposed sec. 429-m providing in substance that in litigation in regard to riparian privileges and rights in which reasonableness is an issue the reasonableness of the alterations effected or the activities carried on by all the parties to the suit shall be determined and taken into account.⁶⁴⁶ While there appear to be no

judicial utterances phrased in precisely this language, holdings have been rendered by the courts, including those of New York, which are based in part on consideration of the reasonableness of the plaintiff's alteration, activity or claim of a right to restrict the defendant's alteration or activity as well as on consideration of the reasonableness of the defendant's alteration, activity or claim that the plaintiff should take steps which would reduce the harm the defendant was causing him.⁶⁴⁷ It is submitted that the rule embodied in subd. (3) of proposed sec. 429-m can not only be deduced from the widely accepted general principles that the rights of riparian owners are equal,⁶⁴⁸ and that a decision in a suit between riparian owners to determine the extent of their several riparian privileges and rights is arrived at by balancing their conflicting claims,⁶⁴⁹ but can also be arrived at by induction from the holdings referred to. And finally the provision in proposed sec. 429-n of the Harmful Use Bill that a person who causes harm by the negligent alteration of the natural condition of a stream or lake is liable for such harm⁶⁵⁰ constitutes a codification of the common law.⁶⁵¹

Sec. 2. Purposes which would be Served by the Codifying Provisions of the Harmful Use Bill.

But it is advisable to cumber the statute books with provisions which neither change nor clarify the law; which do no more than codify well established rules? Inasmuch as the primary purpose of the Harmful Use Bill, like that of sec. 15-0701 of the New York Environmental Conservation Law, is to afford guidance to private persons seeking information as to their privileges and rights among themselves with respect to lakes and streams, and to governmental bodies and officials entrusted with the formulation and execution of projects for the protection and augmentation of New York's water resources,⁶⁵² and although codification of established law is rarely absolutely necessary, it is submitted that this question can be answered in the affirmative. Granted that the elimination of existing uncertainties in New York riparian law is more essential to this purpose than codification of rules already established, it would seem quite likely nevertheless, that such codification would materially assist in the accomplishment of the guidance purpose.

If when a private party or a governmental body or official seeks information about the New York law governing private riparian privileges and rights turns to Title 7 of Article 15 of the Environmental Conservation Law entitled "Private Rights in Waters" he will of course be materially aided by any provisions which clear up points on which the New York common law was uncertain prior to their enactment; but reference to this part of the Environmental Conservation Law would prove to be even more helpful if it would lead them to provisions covering points on which the New York common law has long been settled. Such provisions would not only obviate the necessity for searching through the texts and digests for the common law authorities and prevent the searcher from erroneously assuming that the clarifying provisions embodied the only rules in regard to riparian privileges and rights currently in force in New York, but would also help them more readily to understand the scope and significance of the clarifying provisions by providing them with a more nearly complete picture of New York riparian law than would be afforded by the clarifying provisions alone; and from this more complete picture the relation of the various provisions to one another, whether clarifying or codifying, could be more readily grasped than they could be if only a few of the rules were set forth in the statute and the majority had to be dug out of the mine of common law precedents.⁶⁵³ These considerations apply with special force to the general codification of the New York law as to harm resulting from negligent alteration of the natural condition of bodies of water in view of the absence from most of the texts dealing with riparian privileges and rights of treatment of the relation thereto of the law of negligence.⁶⁵⁴ Nevertheless, because most disputes over privileges and rights with respect to lakes and streams involve intentional rather than negligent conduct,⁶⁵⁵ and because the difficulty in securing the passage of a proposed statute is often measured by its length, it probably would have been unwise to include a more detailed codification of the law governing liability for harm inflicted by negligent alteration of bodies of water than is embodied in sec. 429-n of the Harmful Use Bill.

Sec. 3. Exceptive Provisions of the Harmful Use Bill.

As the Harmless Use Bill enacted in 1966 as sec. 429-j of the Conservation Law and, which is now sec. 15-0701 of the Environmental Conservation Law, was apparently looked upon by its sponsors in the Legislature as the first of a series of steps to be taken toward the clarification of New York riparian law, and as the legislators who introduced the Harmful Use Bill appeared to view it as being merely the second step in the series to be followed in due course by others, rather than as a comprehensive water use act or complete riparian water right code,⁶⁵⁶ several exceptive provisions were wisely included in sec. 429-o of the Harmful Use Bill⁶⁵⁷ in order that its effect should be sufficiently clear to forestall the advancement of claims after its enactment that it was intended to deal with problems other than those which its sponsors actually had in mind when they drafted it.

The first of the exceptive provisions included in the Harmful Use Bill for this purpose states in substance that neither sec. 15-0701 of the Environmental Conservation Law (the Harmless Use Bill enacted in 1966) nor any of the sections which the Harmful Use Bill would, if enacted, add to Title 11 of Article 15 of the Environmental Conservation Law shall be construed as increasing the number of instances in which it is now lawful for a person to enter personally or by agent on the riparian land of another, or to enter in such manner on the surface or beneath the surface or on or beneath the bed of a stream or lake, the bed of which is owned by another, or to cause the dry land of another to be so covered or permeated with water that harm to its owner results. If this exceptive provision were not included in the Harmful Use Bill it is conceivable, in view of the legalization of harmless alterations in bodies of water by sec. 15-0701 and of the legalization of harmful activities in connection with lakes and streams when reasonable under all the circumstances, which would be effected by proposed secs. 420 - and 420-m, that persons might claim the privilege of entering on privately owned riparian land to obtain access to the water, or on privately owned lake or stream bed, or the privilege of harmfully flooding or permeating privately owned riparian

land with water, if they believed that they could show that their acts were reasonable under all the circumstances. If it were objected that all of the acts in question would constitute trespasses at common law;⁶⁵⁸ that sec. 15-0701 was not intended to enable a defendant to justify even a harmless trespass effected by personal entry on riparian land to gain access to the water by demonstration of its reasonableness; and that secs. 429-k and 429-m are not intended to enable a defendant to justify harmful trespasses by such a demonstration, the claimant could reply that while sec. 15-0701 deals in terms only with harmless alterations in bodies of water, it should, as remedial legislation, be broadly construed to cover harmless activities in connection with lakes and streams, including harmless trespasses to gain access thereto; that secs. 429-k and 429-m do not in terms purport to exclude activities in connection with bodies of water which involve trespasses; and that their language is broad enough to include such activities if literally interpreted. In view of these possibilities it would appear that the exceptive provision under consideration would perform a useful function.

The second of the exceptive provisions included in the Harmful Use Bill for the purpose of preventing disputes over its scope states in substance that neither sec. 15-0701 of the Environmental Conservation Law nor any of the sections which the Harmful Use Bill would, if enacted, add to Title 11 of Article 15 of the Environmental Conservation Law shall be construed as altering the existing New York common law with respect to the privileges and rights of persons making domestic use of the water of lakes and streams. In view of the declaration in substance in proposed 429-k (2) that harmful alterations in a body of water shall, if unreasonable under all the circumstances, be unlawful, and in view of the declaration in substance in proposed sec. 429-m(2) that no alteration shall be held unreasonable merely because of its sort, it is conceivable that if this exceptive provision were not included in proposed sec. 429-o, a person harmed by the withdrawal of water from a lake or stream for domestic use might claim that because domestic uses are not expressly exempted from the rule embodied in proposed sec. 429-k(2) and because the declaration in proposed sec. 429-m(2) that no alteration shall be held unreasonable merely because of its sort, creates by implication the counterpart

rule that no alteration shall be held reasonable merely because of its sort, it was intended by these sections to subject domestic uses to the general doctrine of reasonableness to which other uses are subject and to abolish the common law preference accorded to domestic uses by the New York common law implemented by the rule that a riparian owner is entitled to take as much water as he needs for domestic purposes, regardless of the harm which his withdrawals cause to other parties. In the light of this not unlikely possibility it appears that the domestic use exceptive provision might play a useful role were the Harmful Use Bill enacted.

The last of the exceptive provisions included in proposed sec. 429-o of the Harmful Use Bill to the end that there shall be as little misunderstanding as possible as to the effects which it would have if enacted, states in substance that none of the sections included in the bill shall be construed as altering or affecting the right to exercise any power which the State of New York or any agency thereof, or any governmental unit thereof may have to enjoin the initiation or continuance of an alteration in a body of water, or as increasing or decreasing the rights, privileges and powers of any of said governmental bodies in and with respect to lakes and streams.⁶⁶¹ If it were not for this statement and for the definition of "person" contained in subd. (1) of sec. 15-0701⁶⁶² there could, in view of the legalization by proposed secs. 429-k and 429-m of harmful alterations and activities if reasonable, conceivably be doubt as to whether a person charged with a violation of the state's stream protection law⁶⁶³ or of its anti-pollution legislation⁶⁶⁴ would have a defense to the charge if he could convince a trier of the fact that his act, though substantilly harmful and forbidden by statute, was reasonable under all the circumstances,⁶⁶⁵ as well as doubt as to whether a municipality or other governmental entity could hope to avoid payment of damages for harmful diversions of water for public supply or harmful pollution of streams by sewage disposal by establishing the reasonableness of its conduct.⁶⁶⁶ The last exceptive provision in proposed sec. 429-o, therefore, might prevent considerable litigation which, except for its presence, might arise if the Harmful Use Bill were enacted.

CHAPTER 6

RELAXATION BY SEC. 429-1 (e11) OF THE HARMFUL USE BILL OF THE EXISTING
RESTRICTION ON HARMFUL USE OF WATER BY A RIPARIAN OWNER FOR THE
BENEFIT OF HIS NON-RIPARIAN LAND

In one area of New York water law - that in regard to non-riparian use - there exists a need for legislation which cannot be satisfied by a statute which merely clarifies existing uncertainties, but can be met only by one that would effect a change in New York common law now in force. As previously pointed out, an often voiced criticism of the riparian system is that in most of the states in which it prevails it restricts to too great an extent the use of lake or stream water for the benefit of non-riparian land.⁶⁶⁷ In some jurisdictions such use is prohibited, even though harmless.⁶⁶⁸ Under what is probably the plurality view such use is forbidden if it causes harm, even though the harm would have been reasonable and lawful if inflicted in the course of a use for the benefit of riparian land.⁶⁶⁹ This appears to be the present New York position.⁶⁷⁰ And under this plurality view non-riparian use is permitted if it is harmless.⁶⁷¹ The uncertainty which existed in New York as to whether this feature of the plurality view prevailed in New York was dispelled in 1966 by the enactment of the Harmless Use Bill as sec. 15-0701 of the Environmental Conservation Law as previously pointed out.⁶⁷² In only a few states is a harmful non-riparian use permitted at common law, if reasonable under all the circumstances.⁶⁷³ In jurisdictions in which non-riparian uses are illegal though harmless; and in those in which non-riparian uses are legal only if harmless, a riparian owner making a use on non-riparian land owned by him is as much subject to the restrictions on non-riparian uses as is a person making a non-riparian use who owns no riparian land.⁶⁷⁴ There is, moreover, authority for the proposition that the common law restriction on a riparian owner's place of reasonable harmful use precludes such use on any land other than his own, even though the other land is riparian; and on any riparian land which he may own other than the riparian land to which the riparian privilege which he

seeks to exercise was originally incident. Thus in *Duckworth v. Watsonville Water & Light Co.* the court said: "His riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose upon land not riparian, nor upon any riparian land other than his own."⁶⁷⁵ And in *Holmes v. Nay* the court, when discussing the riparian privileges and rights of Nay, the owner of two tracts of land riparian to the same stream, declared that "the use to which Nay was putting the water, a use not on the 101-acre tract, but on the tract below it, was not a use permitted as an incident of the ownership of the 101-acre tract...his right to such use must depend upon whatever rights he may have as the owner of the tract to which the water is conveyed and where it is used."⁶⁷⁶

Justification for the criticism of the discrimination against non-riparian uses which is required by the law of most riparian doctrine states is afforded by the fact that under some circumstances, non-riparian uses would better serve the interests of the riparian owner and of the public⁶⁷⁷ than riparian uses; and by the further fact that some riparian owners, who are not in a position to engage in a water-based activity, would be better off if they could sell their riparian privileges and rights to a non-riparian for use in connection with non-riparian land. To enable a riparian owner to dispose advantageously of riparian privileges and rights of which he found himself unable to make profitable use would, in many states, in view of the present state of the law as to the transferability of riparian privileges and rights, require legislation clarifying existing uncertainties in that law in addition to legislation authorizing non-riparian use.⁶⁷⁸ But to enable a riparian owner who could make better use of the water of a lake or stream on non-riparian land which he owned than on his riparian land to substitute non-riparian for riparian use would require no more legislation than a statutory authorization of the sort appearing in proposed sec. 429-1(e11) of the Harmful Use Bill which provides in substance that if a person owning land riparian to a body of water has the privilege of effecting a certain harmful alteration in it or of carrying on a certain harmful activity in connection with it to further the use and enjoyment of his riparian land, such person in lieu of the

exercise of such privilege, may effect such alteration or carry on such activity to further the use of non-riparian land owned by him, provided the substitution of his non-riparian land for his riparian land as the beneficiary of such privileges does not cause greater harm to the persons having an interest in such body of water, or require a greater alteration in or activity in connection with it than would have been caused or required if such substitution had not been made.⁶⁷⁹

Although the enactment of this proposed section would effect only a relatively minor relaxation of the restrictions on non-riparian use now prevailing in most riparian doctrine states, its adoption in New York and other eastern jurisdictions in which rules discriminating against harmful non-riparian use are now in force would seem to be clearly desirable.⁶⁸⁰ Such legislation would further both the interest of a riparian owner who could make more profitable use of his riparian privileges and rights for the benefit of his non-riparian land than he could make of them for the benefit of his riparian land, and the public interest in the optimum development and use of the land and waters of the state. Moreover, because of the conditions which the proposed section makes prerequisite to the exercise of the privilege of substitution by a riparian owner, the interests of other riparian owners on the lake or stream involved are adequately protected. These conditions, for example, would prevent a municipality which owned a riparian tract affording access to a body of water from using the section as the basis of a privilege to withdraw large amounts of water from a lake or stream for public supply without making compensation to the private riparian owners harmed by such withdrawals.⁶⁸¹

Are the imposed conditions too severe? Although this question is possibly debatable, a negative answer would seem to be the proper one. While the provision that a substitution of non-riparian land for riparian land as the beneficiary of a riparian privilege cannot be made if it would require a greater alteration in or activity in connection with the body of water involved than if the substitution had not been made would prohibit among other acts a greater alteration in the body of water by the withdrawal of a greater amount of water than would have been permissible

for the benefit of the riparian tract, and so would prevent the riparian owner making the substitution from using more water on or in connection with his non-riparian land than he could have used on or in connection with his riparian land, even when the quantity of water which he could have reasonably used for that purpose would have been very small because of the physical characteristics of his riparian land and when the quantity he could reasonably use on or in connection with his non-riparian land would be much larger, it would seem desirable to give the other riparian owners the protection afforded by the provision in question as well as by the provision against any increase in the amount of harm to them.⁶⁸²

This quantitative limitation on the amount which a riparian owner could use on his non-riparian land would not, however, necessarily restrict him to the use on such land of an amount of water no greater than he was using on his riparian land at the time he effected the shift in place of use; for his privilege of use is variable in extent and can increase in size in response to changed conditions.⁶⁸³ So if after he begins his use for the benefit of his non-riparian land conditions on the stream so change that the amount which he could have lawfully used on his riparian land is increased, he would be entitled to use the greater amount on his non-riparian land, despite the fact that the expansion in the quantum of his privilege occurred after he had shifted the place of use.

Analogical support for the imposition of both conditions is afforded by the rule prevailing in appropriation doctrine states permitting the exercise of appropriative water privileges for the benefit of a tract of land other than the one for which the appropriation was originally effected only if the shift in the place of use will not be prejudicial to other appropriators;⁶⁸⁵ and by the fact that in appropriation doctrine states, the extent of the appropriative privilege is stated in terms of a definite amount of water,⁶⁸⁶ which would normally lead to the result that the privilege could not be quantitatively increased by a shift in the place of use.

But would the conditions which would be imposed by the proposed section on the exercise of the privilege of substitution of non-riparian for riparian use raise questions of fact too difficult for a jury or court to handle? It is submitted that they would not. Although the appropriation doctrine rule referred to has given rise to considerable litigation,⁶⁸⁷ there appears to be no pressure for its abandonment on the ground that it is impossible to administer.

Nor would the enactment of proposed sec. 429-1(e11) be inconsistent with the plan apparently being followed by the New York legislature to effect needed changes in New York water law by revision of New York's version of the riparian doctrine rather than by substitution of the appropriation system in whole or in part.⁶⁸⁹ Inasmuch as that system permits non-riparian use of water⁶⁹⁰ with scarcely any restriction,⁶⁹¹ it could, of course, be argued that any relaxation in a riparian doctrine state of its restrictions on non-riparian use would involve an acceptance of part of the appropriation system. If it were true that non-riparian use under any and all circumstances were forbidden by the riparian doctrine, and that lawful non-riparian use were possible only under the appropriation system, this argument would have considerable force. But, as already pointed out, this is not the case; for under the reasonable use version of the riparian doctrine an appreciable number of states have held that harmless non-riparian uses are legal at common law,⁶⁹² while a few others have taken the position that even harmful non-riparian uses can be legal at common law if reasonable under the circumstances,⁶⁹³ and still others have concluded that riparian privileges and rights are transferable to an exercisable by non-riparians; the transferee standing in the shoes of the transferor with respect to the other riparian owners, rather than merely acquiring an interest good only as against the transferor.⁶⁹⁴ Even if it be assumed that under the riparian doctrine all private water privileges and rights have their origin in the ownership of riparian land, these results, arrived at in states

adhering to the reasonable use version of the riparian doctrine, show that it is far from true that the use of lake or stream water on non-riparian land is always unlawful.⁶⁹⁵ Proposed sec. 429-1(e11), if enacted, would not create a privilege in a riparian owner which could be reasonably described as appropriative. It would rather create a privilege of use which, although for the benefit of non-riparian land, would be basically riparian in nature, because it would be an expansion of a privilege arising from the ownership of riparian land and exercisable only by an owner of riparian land. It would, moreover, be measured in extent by the degree to which it could have been exercised for the benefit of riparian land.

CHAPTER 7

CONSTITUTIONALITY OF THE HARMFUL USE BILL

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Sec. 1. Constitutionality of the Harmful Use Bill Provisions under the Due Process Clauses and the Police Power.

- a. The Provisions Legalizing Substantially Harmful but Reasonable Alterations and Activities, and Establishing the Relevance of the Public Interest when Determining Reasonableness.

If it is presently the law in New York that an alteration in the natural condition of a body of water or an activity in connection therewith which causes substantial harm to another riparian owner can be lawful, if reasonable; that substantially harmful alteration of a body of water by diversion, seasonal impoundment, or the addition of foreign water may be found to be unreasonable but is not unreasonable as a matter of law; and that the relative importance to the public of the activities of the contesting parties may be taken into account when passing on the unreasonableness issue in a water case,⁶⁹⁶ there can be no doubt as to the constitutionality of the provisions to that effect in the Harmful Use Bill, for the codification of common law rules obviously involves no impairment of common law rights.

On the other hand, if the current New York riparian law is to the contrary on any of these points, the Harmful Use Bill, if enacted and enforced, would deprive riparian owners of one or more constituent elements of their present riparian interests; e.g., the right that no alteration be made in a body of water by one riparian owner which would cause substantial harm to another. Since the bill makes no provision for compensation to riparian owners whose riparian interests would be diminished by it under this assumption, it could be argued that a statute embodying the provisions of the Harmful Use Bill would deprive riparian owners of their property without due process of law.

It is submitted, however, that each of the provisions of the bill in regard to the legality of substantially harmful alterations and activities and the relevance to reasonableness of the public interest should be upheld as a valid exercise of the police power in view of the factors which the courts take into account when deciding whether a statute constitutes such an exercise.⁶⁹⁷ The bill would fall far short of completely destroying private riparian interests; for it would leave intact the two principal constituents of such interests - the riparian owner's privilege of reasonable use, and his right that the exercise of that privilege should not be unreasonably interfered with - and would merely deprive riparian owners (1) of the right to insist that they never be substantially harmed by the activities of a fellow riparian, no matter how reasonable that activity might be in view of all the circumstances, and (2) of the immunity from the risk that their position might be adversely affected if the public interest were taken into account; more specifically, from the risk that their activity might be found to be unreasonable or that their adversary's activity might be found to be reasonable, because of the public interest, although the findings would have been to the contrary if the public interest had been ignored. This subtraction from the riparian interest of the right and immunity referred to is largely offset by the increase in the extent of the privilege of use enjoyed by each riparian owner resulting from the curtailment of the right to be free from substantial harm and from the abolition of the immunity from the possible consequences

of consideration of the public interest.⁶⁹⁸ In other words, whether any particular riparian owner would suffer disadvantage or derive advantage from the revision of the content of the riparian interest which would be effected by enactment of the provisions of the Harmful Use Bill under consideration would depend in all cases on the particular circumstances, which would normally change from time to time; and in many cases on whether he was seeking to make or was complaining of substantially harmful alteration.

Moreover, such hardship as enforcement of the provisions of the Harmful Use Bill discussed in this section might inflict on any particular riparian owner would seem to be outweighed by the public interest in the optimum use of the state's water resources which would be served by these provisions,⁶⁹⁹ and in the proper adjustment of the privileges and rights of riparian owners as among themselves⁷⁰⁰ which these provisions would make. Since such impairment of the riparian interest as they might cause would be for these purposes rather than for increasing the economic value of some public enterprise, compensation should not be required for it.⁷⁰¹ Analogical support for this position would seem to be afforded by the decisions upholding the constitutionality of zoning legislation,⁷⁰² which involves adjustment of the rights and privileges of adjoining landowners as among themselves,⁷⁰³ despite the losses and disappointed expectations⁷⁰⁴ which such adjustment causes, unless they are so great as to amount to confiscation.⁷⁰⁵ The public interest in an adjustment of private privileges and rights tending to benefit the majority is held to outweigh the losses inflicted on the few.⁷⁰⁶

If the provisions under consideration be weighed in the light of the doctrine that a statute cannot be held to constitute a valid exercise of the police power if it would effect too drastic and unforeseeable a change in existing law,⁷⁰⁷ they would probably be upheld. Since a rule requiring sharing of water in times of shortage is included in the riparian doctrine in an appreciable number of states,⁷⁰⁸ despite the fact that such sharing often results in substantial harm to each water user involved,⁷⁰⁹ and since the contention that such sharing serves the public interest in the equitable distribution of water has considerable force,⁷¹⁰ the enactment

of a statute which included among its several consequences the facilitation of apportionment of water by making it clear that a substantially harmful alteration in or use of a lake or stream could be held lawful if reasonable under all the circumstances, could be properly characterized as a reasonable rather than as a drastic step and as a predictable rather than as an unforeseeable development in the law.⁷¹¹

But would the statements in substance in secs. 429-k and 429-m of the Harmful Use Bill that its provisions shall apply to alterations and activities begun before its enactment⁷¹² encounter constitutional difficulty? Suppose that U and L are respectively upper and lower riparian owners on a stream; that in 1968 U effected an alteration of the stream which caused and is causing L substantial harm; that these sections are enacted in 1969; that L sues U for the harm which U has caused him; that U defends on the ground that his alteration is reasonable and that although it was unlawful when begun in 1968 because substantially harmful, it is now lawful because these sections legalize retroactively substantially harmful alterations made before their enactment if reasonable under all the circumstances; and that L replies that the retroactive feature of the sections cannot constitutionally be enforced against him because it would deprive him without compensation of the cause of action against U which accrued in 1968. What would be the court's reaction?

It is submitted that it would reject L's contention, because a legislature may destroy an accrued cause of action without compensation, even though it constitutes private property, by a valid exercise of the police power;⁷¹³ and because secs. 429-k and m should be recognized by the courts as valid police measures in view of their principal purposes and effects: viz., a proper readjustment of the privileges and rights of riparian owners as among themselves, and encouragement of the use of the lakes and streams of the state for purposes having the greatest social value.⁷¹⁴

Although it seems likely that the number of cases of action for substantially harmful alterations which would be in existence when the sections in question were enacted would be small, and that it could therefore be argued that the total benefit which would accrue from their abolition

would be correspondingly small, this consideration would seem to be outweighed by a justifiable reluctance to preserve causes of action which should never have been allowed to come into existence in the first place because of the reasonableness of the defendants' conduct.

But would L's ability to prevent the retroactive enforcement against him of secs. 429-k and m be any greater in the following situation? Suppose that prior to their enactment and while U was making no use of the stream, L began taking water from it and made a substantial investment in the equipment and structures required by his water-based activity. After the enactment of the provisions in question U began to withdraw so much water from the stream that L was forced to curtail his activity; and this curtailment caused L substantial harm. L thereupon brought an action against U for an injunction requiring U to reduce his withdrawals and to recover damages already suffered. U bases his defense on the provisions under consideration, contending that his withdrawals are lawful, despite the substantial harm they inflict on L, because reasonable under all the circumstances. L replies that while the established New York rules that riparian privileges are not lost by non-use⁷¹⁵ and that their extent varies in response to changes in the situation, such as U's decision to begin to use the stream,⁷¹⁶ prevent him from claiming unfair surprise at being compelled to share the stream with U to some extent, he was entitled to rely on continued enforcement of the rule that an alteration or activity which causes substantial harm is unreasonable as a matter of law and therefore illegal which rule for the purpose of this part of the discussion is assumed as existing prior to the enactment of the Harmful Use Bill and which rule proposed secs. 429-k and 429-m purport to abolish retroactively. L further contends that he showed his reliance on this rule by investing more in his water-based activity than he would have were it not for the rule's existence; and that enforcement of secs. 429-k and 429-m against him would not merely disappoint his reasonable expectations,⁷¹⁷ but would cause him a loss large enough to be characterized as confiscatory.

It is doubtful, however, that L's claim, or a similar one made by another riparian under comparable circumstances, would be accepted by the

courts. A tribunal operating under sec. 429-k and 429-m could not come to any conclusion as to whether the substantial harm caused L by U's withdrawals was reasonable without considering all the relevant facts and circumstances, including, as expressly provided by Sec. 429-m,⁷¹⁸ the priority in time of L's activity, the fact that U's riparian tract was upstream from L's, the relative importance to the public of the litigants' activities, and a comparison of the amount of harm which U would suffer if he were forced to diminish his withdrawals with the amount of harm which L would suffer if U were allowed to continue withdrawals of the size complained of by L. If after considering all the facts and circumstances, including the four just referred to, the court concluded that the harm which L was suffering was reasonable despite its substantial character, it could be argued that the harm to L could not be classified as confiscatory. When a court is considering whether the substantial harm sustained by L is reasonable, it is at the same time necessarily considering whether or not it is confiscatory, because a court could scarcely find substantial harm to be reasonable if it were confiscatory. Were L to contend that if the harm is substantial, its consequence is confiscation, the analogy afforded by the zoning cases could be relied on by U. It is well established that a zoning ordinance may constitute a valid exercise of the police power although its enforcement disappoints the expectation of a landowner that he could use his land for a purpose subsequently forbidden by the ordinance, and causes him substantial financial loss.⁷¹⁹ There would seem to be no more reason for holding in a riparian rights case that harm is confiscatory simply because it is substantial than there is for such a holding in zoning cases; at least when, as pointed out above, the water statute attached on constitutional grounds does not attempt to destroy the riparian interest completely, but merely to revise its content. Moreover, it should be noted in this connection that in New York even non-conforming uses begun prior to the enactment of a zoning ordinance can constitutionally be terminated without compensation, although such termination causes harm great enough to be recognized as substantial, if such action is found to be reasonable under all the circumstances.⁷²⁰

The following situation is another in which the question might be raised as to the constitutionality of retroactive application of the provisions of the Harmful Use Bill under consideration. U and L are again respectively upper and lower riparian owners on a stream. Prior to the enactment of proposed secs. 429-k and 429-m U makes an alteration in the stream which is substantially harmful to L, and continues it for the prescriptive period. Subsequent to the enactment of those sections, L brings an action against U for damages, claiming that the amount of harm which the alteration is causing him is unreasonable. U defends on the ground that he has acquired a prescriptive privilege to continue the harmful alteration. L argues that although U's alteration is now illegal because unreasonably harmful, it was lawful when begun, if the statute be retroactively applied in accordance with its terms, because U's alteration, though substantially harmful from the outset, was not unreasonable under the conditions prevailing when U began it, and that L therefore did not have from the beginning the cause of action against U which under the law of prescription is essential to the initiation of a prescriptive privilege in U against L.⁷²¹ U replies that at the time he made his substantially harmful alteration, it was illegal because such an alteration was unreasonable as a matter of law under the common law rule then in force; and that under that rule he had acquired a prescriptive privilege which could not constitutionally be taken away from him without compensation by retroactive application of a subsequently enacted statute.⁷²²

If the court believed that U should not be allowed to continue his alteration any longer, it would be forced to apply the provisions in question retroactively in order to defeat U's claim to a prescriptive privilege, since otherwise U's alteration would have given L a cause of action against U from the beginning, because it was substantially harmful from the outset, and because for the purposes of this discussion it is assumed that the court is of the opinion that under New York common law a substantially harmful alteration is unreasonable as a matter of law and therefore illegal. But as such retroactive application of the provisions under consideration would destroy without compensation the prescriptive privilege which U had acquired under the common law, the court might well

decline to make it, since for all but one of the reasons stated when discussing the constitutionality of retroactive application of sec. 15-0701 of the Environmental Conservation Law in such a way as to defeat U's claim to a prescriptive privilege it is unlikely that such destruction of U's perfected prescriptive privilege to continue a substantially harmful activity could be justified as a valid exercise of the police power.⁷²³ To this extent, then, the constitutionality of retroactive application of the provisions under consideration at this point would seem to be doubtful.

But the situation supposed is one which would probably seldom be encountered; for the court would not in many cases be anxious to compel a termination of a long continued alteration.⁷²⁴ And if a court believed that it was desirable to allow U's alteration to continue, it could easily reach that result either by holding that his alteration was unreasonable from the beginning, which would show that L had a cause of action against U from the outset and that U therefore had the prescriptive privilege he claimed, or by holding this his alteration was reasonable at the present time in view of its long existence. Under neither alternative would either U or L be in a position to challenge the constitutionality of the provision in the proposed statute that a substantially harmful alteration is lawful if reasonable under all the circumstances. U would not have standing to do so because the judgment would be in his favor under both alternatives.⁷²⁵ Nor would L be in a better position. The judgment would have gone against him under either alternative not only under the statute but also at common law. Both at common law and under the provision in question U's alteration is unlawful from the beginning if found unreasonable from the outset; and both at common law and under the statute U's alteration could be found reasonable at the present time if the court believed that in view of all the circumstances, the principal emphasis should be placed on the priority in time factor which while not automatically conclusive under the riparian doctrine as it is under the prior appropriation system, is recognized as relevant to the reasonableness issue at common law in riparian doctrine states,⁷²⁶ as well as by the provisions of the Harmful Use Bill.

To what extent the case of California-Oregon Power Co. v. Beaver Portland Cement Co.,⁷²⁷ often cited in support of legislation modifying common law water privileges and rights, would afford a basis for holding the provisions of the Harmful Use Bill under consideration constitutionally valid, if construed as diminishing the extent of a riparian owner's common law right to be free from harm rather than as merely declaratory of the extent of this common law right in this regard is uncertain. It was held in this case that Oregon had the ability by the exercise of its police power to legalize a presently harmless alteration of the physical condition of a non-navigable stream.⁷²⁸ Although the court said:

"Clearly riparian rights are substantial property rights which may not be arbitrarily destroyed;... Like other property, however, riparian rights are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare... the common law rights to the relative use of certain natural resources may be modified in the interest of securing fairer distribution thereof as well as of preventing physical or economic waste... The modification of riparian rights which the act of 1909 has effectuated is not so drastic a change as to amount to taking of property without due process of law... At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed;... This legislation, however, has changed the conditions under which the riparian owner's privilege...to use the water may be exercised. On the one hand, his unrestricted right reasonably to use his fair share of the waters for beneficial purposes is now subordinated to a prior appropriation for beneficial purposes. On the other hand, he is no longer limited in such beneficial use to his fair proportion of the waters over and above those needed for domestic purposes by all riparian owners; and as a riparian owner, he is in a peculiarly advantageous position to exercise

the right of appropriation. The statute cannot be said to take away property from one in order to give it to another, even though the effect of the operation of the statute in a specific case may be so to transfer the privilege of making some specific use of the water. We conclude, then, that the riparian owner's right to the natural flow of the stream has been validly abrogated by the Water Code of 1909 as construed by the Oregon court. Plaintiff's assertion of such a right in this case cannot, therefore, be sustained."⁷²⁹

these statements, insofar as they apply to harmful alterations and activities, are dicta; for the plaintiff had not shown that it had been harmed by the defendant's act. It is one thing to validate a departure from the natural flow version of the riparian doctrine to the extent of legalizing harmless alterations and activities, but quite another to validate the greater departure involved in legalizing a substantially harmful alteration or activity. Or to express this point in other terms: it is one thing to validate the destruction of a right designed to protect an unexercised riparian privilege, but quite another to validate the reduction of the extent of a right designed to protect a riparian privilege which is actually being exercised.⁷³⁰

Moreover, as already pointed out, the force of the circuit court's decision as to the capacity of a state permit to legalize a presently harmless alteration and of its dicta as to the capacity of a state permit to legalize alterations in general was considerably diminished by their treatment at the hands of the United States Supreme Court, which while affirming the judgment of the circuit court, elected to do so on a ground other than that on which the circuit court had based its decision, and said that it was "passing without consideration" the question as to the validity of the Oregon legislation under the police power.⁷³¹ In an endeavor to preserve an authoritative appearance for the circuit court opinion despite its fate on appeal, it has been asserted that the flavor of the Supreme court opinion appears to be similar to that of the circuit court's rationale;⁷³² and it has been suggested that the Supreme court's

election to base its affirmance on a ground other than that chosen by the circuit court for its decision was not referable to embarrassment by the constitutional question, but rather to the supreme court's desire to render an interpretation of the Desert Land Act. However, since basing a decision on more than one ground is one of the commonest of judicial practices, it can be argued with considerable force that the decision of the supreme court to found its judgment on a ground other than that relied on by the circuit court indicated that the supreme court entertained more than a slight doubt as to the validity of that ground.⁷³³

Another case frequently cited as supporting the constitutionality of state legislation modifying common law water privileges and rights⁷³⁴ is *State ex rel. Emery v. Knapp*⁷³⁵ a quo warranto action brought on behalf of the State of Kansas by the County Attorney of Republic County against the chief engineer of the Kansas Division of Water Resources and a Kansas irrigation district, and submitted to the court on facts stipulated by the parties. In this action the parties sought a judgment determining the constitutionality of a Kansas statute which announced the dedication of all waters within the state to the use of the people, subject to state control and regulation;⁷³⁶ which provided that subject to vested rights, defined as rights to continue existing beneficial uses,⁷³⁷ all waters within the state could be appropriated for beneficial use;⁷³⁸ that nothing in the act should impair the vested right of any person except for non-use;⁷³⁹ that no person could acquire an appropriation right without the approval of the chief engineer;⁷⁴⁰ that no common law claimant without a vested right could enjoin the exercise of an appropriation permit;⁷⁴¹ that if an appropriation resulted in an injury to a claimant of common law rights, he would be entitled to due compensation in an action at law;⁷⁴² and that "An appropriator who has acquired a valid right under this statute may prevent, by injunction, a subsequent diversion by a common-law claimant of private rights without being required to first condemn possible private rights."⁷⁴³

In the stipulation of facts it appeared that the chief engineer, in an exercise of authority which he believed had been conferred upon him by

this statute, had approved the application of the irrigation district for permission to divert 130,000 acre feet of water annually from the Republican River for irrigation purposes within the district; and that the parties had agreed, but only for the purposes of the action, "that substantial injury will result" to riparian land downstream from that comprised within the district.⁷⁴⁴ Although the stipulation did not expressly so state, the reasonable inference from it, from the court's opinion as a whole, and from the terms of the statute is that the owners of the downstream riparian land had not been making use of the water, and so were not in a position to qualify under the statute as holders of vested rights.⁷⁴⁵

The first of seven questions which the parties submitted to the court was whether the statute was "unconstitutional as a taking of pre-existing vested riparian rights of downstream owners."⁷⁴⁶ Although the court answered this question in the negative, it seems clear that this decision could not be cited as indicative of the constitutionality of the provisions of the Harmful Use Bill under consideration which, if enacted, would legalize, if reasonable under all the circumstances, withdrawals of water from a lake or stream, although such withdrawals would be substantially harmful to other riparians. It is true that the fact that the irrigation permit in Emery was upheld despite the assumption that its exercise would result in "substantial injury" to downstream riparian land might conceivably justify classification of the Kansas statute as a harmful use bill; but it is submitted that this fact is outweighed by others: viz., that it cannot be assumed that because one statute classifiable as harmful use legislation has been sustained, all other statutes so classifiable would be held constitutionally valid; and that the provisions of the New York Harmful Use Bill would bear more heavily on riparian owners who had begun water-based activities prior to their enactment than do the provisions of the Kansas statute; for the Harmful Use Bill provisions, because they would legalize the infliction without compensation of substantial harm, when reasonable, even on riparian owners who had begun their activities prior to their enactment,⁷⁴⁷ do not

guarantee full protection to existing uses, whereas the Kansas statute does accord such protection. Moreover, the New York Harmful Use Bill provisions give less protection to unused riparian privileges than the Kansas statute seems to accord to them. Thus a riparian owner who had not used the water but wished to begin doing so could not obtain damages under the Harmful Use Bill provisions for his inability to initiate his use if such initiation were found to be unreasonable, whereas under the Kansas statute he could recover such damages as he could show, and apparently without having to establish the reasonableness of the use he wanted to make but was prohibited from making. In short, as the Harmful Use Bill provisions, assuming that they are not merely codification of New York riparian common law,⁷⁴⁸ would effect changes in that law so much more extensive than those wrought by the Kansas statute in the Kansas riparian common law⁷⁴⁹ that a court's acceptance of the validation of the Kansas statute in *Emery* as sound would not preclude it from striking down the Harmful Use Bill provisions as unconstitutional.⁷⁵⁰

In *U.S. v. Rio Grande Irrigation Co.* the court, after quoting Kent's version of the riparian doctrine, said:

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise."⁷⁵¹

The part of this statement to which emphasis has been added by underlining, and other declarations of similar tenor by the U.S. Supreme Court have often been cited in support of the constitutionality of state statutes purporting to make alterations in riparian privileges and rights without making compensation to riparian owners harmed thereby.⁷⁵² Since it is obvious, however, that acceptance of such a statement as a rule of law without qualification would deprive the owners of riparian privileges and rights of the protection afforded by the 14th amendment to the U.S. constitution to other property rights,⁷⁵³ doubt has been expressed as to the extent to which the statement would be applicable in a case in which

a riparian owner was attacking the constitutionality of a state statute on the ground that it impaired his riparian privileges and rights without compensation and did not constitute a valid exercise of the police power.⁷⁵⁴ Consideration of the context in which such statements have been made affords ample justification for that doubt.

Thus in *Rio Grande*, which was an action brought by the federal government to protect the navigability of the Rio Grande River by obtaining an injunction restraining the defendant, acting under a franchise obtained from the Territory of New Mexico, from diverting a large quantity of its water for irrigation, the court was primarily interested in describing the powers over navigable rivers respectively possessed by the United States on the one hand and the states and territories on the other. It is probable therefore that the court's declaration that a state might change its common law rule as to interests in waters was intended as a definition of the area over which the states rather than the federal government had power, and was not offered as a description of the relations between the states and their citizens with respect to the riparian privileges and rights of the latter.⁷⁵⁵ Tending to support this interpretation of the court's statement is the fact that each of the two limitations on the states' power to change the common law rule as to private interests in streams to which the court referred constituted appropriate parts of a description of the division of power over rivers between the federal government and the states: viz., "First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."⁷⁵⁶

Further support for the interpretation of the court's statement suggested above is afforded by the fact that no riparian owner had appeared in the action as a plaintiff, and by the absence from the opinion of any reference to opposition to the irrigation project on the part of

New Mexico riparian owners. Thus the case before the court could be decided without facing the question as to whether New Mexico had the power to effect uncompensated impairment of riparian privileges and rights; a fact which would warrant the inference that the court's declaration that a state could alter such privileges and rights was not made in answer to that question, but rather as a step in the solution of the jurisdictional problem actually before the court.⁷⁵⁷

The same inference can be drawn with respect to the bearing on the power of a state to effect uncompensated impairments of private riparian privileges and rights of the statement in *Kansas v. Colorado* that a state

"may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."⁷⁵⁸

In this case Kansas sought on behalf of her citizens to enjoin Colorado and corporations organized under its laws from diverting water from the Arkansas River for irrigation to the substantial detriment of some of the citizens of Kansas who owned land riparian to the river. The court declared that

"It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court."⁷⁵⁹

and proceeded to deny the injunction on the ground that although the detriment to Kansas riparians caused by the Colorado diversion was perceptible,

it was not so great as to violate the principle of equitable apportionment applicable to disputes between states over the allocation of water.⁷⁶⁰

The issues resolved, therefore, were as to the division of power over interstate rivers between the U.S. Supreme Court and the states through which they flow; and as to whether Colorado had the privilege of inflicting harm on Kansas citizens by irrigation diversions, provided they were not so great as to violate the principle of equitable apportionment between states.⁷⁶¹ To the decision of these issues a resolution of the problem as to whether a state had the power to change its water law without compensating those of its own riparian owners as were harmed by the change was unnecessary; and the inference seems justified that the court's declaration as to a state's power to change its water law was not intended to bear on that problem.

For substantially similar reasons the same inference can be drawn as to the purpose of the statement in *Connecticut v. Massachusetts* that

"...every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise."⁷⁶²

Like *Kansas v. Colorado*, this was an action to enjoin diversion of river water by an upstream state to the prejudice of the citizens of a downstream state. Although *Connecticut* argued that the *Massachusetts* diversion for municipal supply would infringe vested *Connecticut* property rights which could not be taken without her consent against the will of the owners, the Supreme Court, following *Kansas v. Colorado*, held that the principle of equitable apportionment between states applied, and as the diversion objected to would cause no harm to *Connecticut* citizens under the conditions prevailing at the time, *Connecticut* was not entitled to injunctive relief. It was, of course, able to reach this result without considering whether *Massachusetts* would be liable to such of her own riparian owners as would be harmed by the diversion, or whether the statute authorizing it was a valid exercise of the police power. It can, therefore, be inferred that the court's declaration that a state had the power to change its water law was not intended to apply to a dispute between *Massachusetts*

and her own riparians, but rather to a dispute between Massachusetts and the citizens of another state; the exercise of the power to be subject to the principle of equitable apportionment of water between states.⁷⁶³

Nor can the statement in *California Oregon Power Co. v. Beaver Portland Cement Co.* that

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' Kansas v. Colorado, 206 U.S. 46, 94, the full power of choice must remain with the state."⁷⁶⁴

be interpreted as a recognition of a power in a state to make changes in its water law without compensating such of her citizens as are harmed thereby; for, as previously pointed out, the Supreme Court expressly declined to pass upon the validity of the circuit court's decision that although enforcement of the Oregon Water Code would destroy the substantial property right of the plaintiff to the normal flow of the stream bordering its land, the enactment of the code constituted a valid exercise of the police power.⁷⁶⁵ In view of this fact, the statement of the court quoted above must have been intended as an assurance to the states that the court's holding that a federal patent granted subsequent to the passage of the Desert Land Act carried with it no common law riparian right to the water to which the patented land was riparian did not deprive the states of their power as against the federal government to choose and change the rules applicable to the waters within their borders.

Further support for the above suggested interpretation of the U.S. Supreme Court's declarations in *Rio Grande, Kansas v. Colorado*, *Connecticut v. Massachusetts*, and *California Oregon Power* that a state may choose or change its water law is afforded by *Lindsley v. Natural Carbonic Gas Co.*⁷⁶⁶ In this case an owner of land in which was situated percolating water holding in solution mineral salts and carbonic acid gas sought an injunction restraining the enforcement against it of a New York statute which, as interpreted by the New York Court of Appeals, forbade the withdrawal of such water for the purpose of extracting the gas therefrom and selling the gas as a separate commodity, when the source of the water withdrawn was not confined to the land of the withdrawing party, when the draft made upon the source of supply was unreasonable and wasteful in view of the coequal privilege of others through whose land such water percolated to withdraw it, and when it caused harm to them. The plaintiff contended that the enforcement of this statute against it would constitute a taking of its property without due process of law in violation of the 14th amendment to the U.S. constitution, since the statute did not provide for compensation to the plaintiff for the restriction it imposed on plaintiff's common law privilege of withdrawal.

If the U.S. Supreme Court had believed that its statements in *Rio Grande* and subsequent cases that a state has the power to change its water law as it sees fit recognized in the states a power to make such changes without compensation when they harmfully impaired the common law water privileges and rights of their citizens, the court could have easily disposed of the plaintiff's contention by upholding the statute as an exercise of that power. Its failure to do so, or even to refer to that power, and its election to uphold the statute as a valid exercise of the state's police power,⁷⁶⁷ seems to indicate quite clearly that it believed that the states' general power to change their water law could not, in view of the 14th amendment, be exercised by the enactment of a statute unless it constituted a valid police power measure.⁷⁶⁸ It is also worthy of note that the New York court's earlier decision upholding the constitutionality of the statute was based on the state's police power rather than on the doctrine that the states may choose or alter their water law.⁷⁶⁹

And finally explicit support for the view expressed above that the states' power to choose and change their water law is subject to the restraint of the 14th amendment is found not only in the statements of other writers,⁷⁷⁰ but also in the concurring opinion of Justice Stewart in the recent case of *Hughes v. State of Washington*.⁷⁷¹ This was an action in which the plaintiff sought a determination that she was the owner of land formed by accretion between 1889 and 1966 to a tract in the defendant state bordering on the sea. Mrs. Hughes' predecessor in title had obtained a federal patent to the ocean front tract in 1866; and Mrs. Hughes became the owner subsequent to 1889 and apparently later than 1946. When Washington was admitted to statehood in 1889, art. 17 of her constitution asserted her ownership of the beds and shores of all navigable waters up to the line of high tide or high water. In *Ghione v. State of Washington*,⁷⁷² decided in 1946 the Washington Supreme Court rejected the contention of the state that art. 17 operated to deprive private riparian owners of post-1889 accretions. In the instant case, however, decided in 1966, the state court, distinguishing *Ghione* on the ground that it involved land riparian to a river instead of to the ocean, held that the post-1889 accretions in litigation belonged to the state rather than to Mrs. Hughes.⁷⁷³

The U.S. Supreme Court, speaking through Justice Black, reversed this decision, holding that the effect of the federal patent was a federal question; and that although the U.S. government could, if it so desired, apply a state rather than a federal rule, it should not do so in this case because

"The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land'."⁷⁷⁴

The court then went on to hold that under the federal rule the owner of oceanfront land had a right to the accretions thereto.

Justice Stewart, although concurring in the judgment of reversal, explained his preference for basing it on other grounds in the following language:

"Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules...For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant."⁷⁷⁵

But that Justice Stewart did not conceive of the states' power to choose and change their property and water law as unlimited clearly appears from the following statements, made after he had rejected the contention that Ghione was distinguishable from the case before the court:

"I can only conclude...that the state court's most recent construction of Article 17 effected an unforeseeable change⁷⁷⁶ in Washington property law as expounded by the State Supreme Court. There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain...Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment

forbids such confiscation by a State, no less through its courts⁷⁷⁷ than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."⁷⁷⁸

It would seem then that despite frequent judicial declarations that the states have the power to choose and change their water law, the ability of the provisions of the Harmful Use Bill legalizing substantially harmful but reasonable alterations in and activities in connection with lakes and streams, and establishing the relevance of the public interest when determining reasonableness to withstand attack on the ground that their enforcement would violate the due process clauses will depend upon whether or not the courts will conclude that they merely codify the existing common law, or that if they effect changes in it, such changes constitute valid exercises of the state's police power. While arrival by the courts at the first of these conclusions cannot be counted on, for the existing New York common law on these points is indeed uncertain,⁷⁷⁹ it is far from clear that the courts would reject it.⁷⁸⁰ Moreover, for reasons previously stated,⁷⁸¹ it is submitted that except in one situation which is most unlikely to arise because of the courts' ability to prevent it,⁷⁸² the provisions under consideration should and probably would be upheld by the courts as valid police power measures.

Is this probability decreased or increased by the conclusions reached in *Hathorn v. Natural Carbonic Gas Co.*?⁷⁸³ One of these conclusions was that state legislation was unconstitutional which in substance purported pumping did not interfere with the capture of such water by others, and even though the water pumped was used in connection with the pumper's land.⁷⁸⁴ Under New York common law a landowner has the privilege of pumping percolating water, although by so doing he curtails his neighbor's supply, provided he uses the water extracted for the benefit of his overlying land.⁷⁸⁵ Despite the fact that the legislation purported to destroy a large part of the landowner's privilege of withdrawal, leaving him free to take only such water as he could get without pumping, it made no

provision for compensating the landowner for the harm which that restriction might cause him. The court's decision that this legislation failed to qualify as a valid police power measure was obviously correct. As pumping was prohibited even when it would cause no harm to neighboring owners, the loss inflicted by the legislation could not be justified as one incidental to the achievement of a proper adjustment of privileges and rights with respect to percolating water as between adjoining landowners.⁷⁸⁶

Although the statute was entitled "An act for the protection of the natural mineral springs of the state and to prevent waste and impairment of its natural mineral waters," it could not be justified as a measure necessary to the preservation of the state's natural resources, because it did not include a legislative finding that unless pumping were forbidden a waste of such resources would result; and this lack was not supplied by evidence introduced at the trial.⁷⁸⁷ The provisions of the Harmful Use Bill under consideration, on the other hand, could easily qualify as valid police power measures because essential to an equitable distribution of privileges and rights with respect to lakes and streams among riparian owners and to the protection of the public interest in bringing about such a distribution by allowing harmful alterations in and activities in connection with lakes and streams when reasonable under all the circumstances, and by requiring that the public interest be taken into account when passing on the issue of reasonableness.

Indeed, Hathorn, instead of casting doubt on the validity of the Harmful Use Bill provisions as police power measures, tends to establish it by its conclusion that legislation was constitutional which forbade the withdrawal of mineral water for the purpose of extracting the gas therefrom and selling it as a separate commodity, when the source of the water withdrawn was not confined to the land of the withdrawing party, when the draft made upon the source of supply was unreasonable and wasteful in view of the co-equal privilege of others to withdraw it, and when the draft caused harm to them.⁷⁸⁸ The court said:

"... it was entirely proper for the legislature to adopt the provision in question defining and regulating the rights of

persons desiring to use mineral waters like those at Saratoga Springs and calculated to prevent such use thereof as would either result in waste of the natural resources of the land to the injury of general and public interests, or in the unreasonable impairment of the rights of others entitled to withdraw from a common source."⁷⁸⁹

The court also said:

"They⁷⁹⁰ have an interest in the preservation of natural products like these mineral waters,⁷⁹¹ and it fairly may be said that they have a substantial and enforceable interest in preserving the just and reasonable use by all the members of a community of a common supply of a natural product and in so curtailing the attempts of one or a few to get an unjust proportion thereof, that the rights of other members of the community will not be interfered with and that disputes and litigation shall not be precipitated and that large amounts of property shall not be endangered."⁷⁹²

And in People v. N.Y. Carbonic Acid Gas Co. the court, in commenting with approval upon the conclusion in Hathorn that this legislation was valid, said:

"The legislature could not enact arbitrarily upon the subject and we should not so read the act, in question. We must read into it the intent to regulate the conflicting rights of landowners, who derive enjoyment, or profit, from the use of these waters within the earth and of their constituent ingredients and gases. In that aspect, the enactment was a proper exercise of the police power, which the government possesses and by which, among other objects of governmental solicitude, it regulates the intercourse of citizens and insures 'to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others,' (People ex rel. N.Y. Electric Lines Co. v. Squire, 107 N.Y. 593,605; Cooley's Constitutional Limitations 572)."⁷⁹³

Although it is true that the legislation upheld in Hathorn prohibits the infliction of harm under certain circumstances, whereas the Harmful Use Bill provisions purport to legalize its infliction under specified conditions, it does not follow that a proponent of the constitutionality of the Harmful Use Bill could not rely on Hathorn for support. The distinction noted is more apparent than real. Enforcement of the mineral water statute upheld in Hathorn could in some cases cause as much loss as that which might have to be borne by a party prevented by the Harmful Use Bill from recovering damages for harm reasonably inflicted upon him. In short, the infliction of harm by curtailment of a power to sue should be no more beyond the scope of the state's police power than is the infliction of harm by restriction of a privilege of use.

b. Constitutionality of the Harmful Use Bill Provision
Establishing the Relevance of Malicious Motivation when
Determining Reasonableness.

Par. (g) of subd. (1) of sec. 429-m of the Harmful Use Bill provides in substance that in determining the reasonableness of a harmful alteration in or of a harmful activity in connection with a lake or stream the motive of the actor shall be taken into account; and that such acts, though they would be reasonable if not maliciously motivated, are unreasonable if primarily motivated by malice.⁷⁹⁴ Because the New York common law as to the effect of the malicious motivation of a party on the existence of riparian privileges and rights claimed by him is so completely uncertain,⁷⁹⁵ it is impossible to state with accuracy the extent of the change which the enactment of par. (g) would effect in the New York common law.

If in litigation involving the constitutionality of par. (g) a New York court should take the position that the existing New York common law is in accord with the third of the three views⁷⁹⁶ previously referred to as to the effect of a party's malice on his riparian privileges and rights: viz., that a harmful act, though lawful if normally motivated, is unlawful if primarily motivated by malice, the court could uphold this paragraph as a substantial codification of existing law. But if the court were to conclude in such litigation that the existing New York law on the question was in accord with the first of the three views: viz., that

a party's malice is totally irrelevant, or with the second view: viz., that a harmful act, though lawful if normally motivated, is unlawful if solely motivated by malice, the court would no doubt perceive that the effect of par. (g) would be slightly to reduce the number of instances in which New York riparian owners are now free to inflict harm on others without subjecting themselves to liability; and this without providing for compensation to riparian owners harmed by this reduction in the extent of their riparian privileges. It is submitted that the court would nevertheless hold that such reduction constituted a valid exercise of the state's police power and that par. (g) was therefore constitutional; at least in cases in which only its prospective application is sought.⁷⁹⁷

Application to par. (g) of the criteria to which the courts are accustomed to resort when deciding whether or not a statute can pass muster as a police power measure⁷⁹⁸ tends to justify this prediction. The curtailment in the quantum of riparian privileges and rights which the paragraph would effect would be relatively insignificant; for it would serve to restrict them only in those rare instances in which their assertion is motivated primarily by malice. Although par. g. would deprive riparian owner A, if so motivated, of the privilege of engaging in an activity harmful to riparian owner B, even though except for A's malice it would have been reasonable and lawful, and although the paragraph would prevent A from restricting an activity of B which is harmful to A, even though except for A's malice, B's activity would be unreasonable and unlawful as against A, it would leave A's riparian interest intact in all other respects. And this small diminution in the quantum of the common law riparian interest of any particular riparian would, of course, be offset by the increase in his riparian privileges and rights as against all other riparians which would be the consequence of their subjection, along with him, to the terms of par. g. If it were his policy never to engage in maliciously motivated conduct, par. g. would be of great advantage to him. While it would protect him from adversaries primarily motivated by malice, the reduction in his own riparian privileges and rights effected by par. g. would not interfere with his normal pattern of action. And even a riparian owner with a tendency to act from malicious motives

might not fare too badly under the paragraph; for while he might not derive a net advantage from it, he might well gain an amount of protection from the malice of others which was equivalent to his lost freedom to act maliciously toward others. At any rate, prospective enforcement of par. g. is not likely to cause any riparian owner substantial financial loss. Indeed, by penalizing action primarily motivated by malice it should discourage riparian owners from engaging in unprofitable water-based activities and from starting lawsuits the cost of which would be greater than the value to them of any judgment they might obtain therein.

It must be admitted, however, that par. g., by increasing the number of instances in which the difficult question of motive could be raised, creates for riparians normally actuated by proper motives, as well as for those with anti-social tendencies, a hazard to which they are not now subject: viz., that a liability will be imposed on them in consequence of an erroneous finding as to the extent to which their conduct was motivated by malice.⁷⁹⁹ However, if this risk is measured in the light of the decisions arrived at in the past in cases in which malice has been charged, it would appear to be small. Granted that after the enactment of par. g. a riparian owner might in some cases be held liable in damages on the ground that an alteration effected by him in a lake or stream at small expense was of no substantial benefit to him and was made for the primary purpose of harming another riparian against whom he bore a grudge, it is most unlikely that a riparian defendant would be held liable in a case in which it appeared that he had invested in expensive installations needed for the profitable operation of his water-based activity, even if it were clearly established that he was glad that his activity was harmful to B. Juries and courts would normally realize that while the willingness of men to invest heavily in an enterprise likely to be profitable may often be perceptibly increased by the probability that it will be harmful to a person in the bad graces of the investor, they almost never invest large sums primarily for the purpose of harming another, even if he is cast in the role of enemy No. 1.

This optimistic prognosis finds considerable justification in the apparent absence of any case in which a plaintiff who based his action on

the alleged malicious motivation of the defendant, has actually obtained damages or injunctive relief, if it appeared that the defendant had made a substantial investment in the harmful activity complained of. The successes of plaintiffs in actions brought for violations of statutes prohibiting the erection of spite fences afford no evidence to the contrary; for the investments of the defendants penalized in these cases is small.⁸⁰⁰ And it should be noted that plaintiffs in cases of this sort have often lost, despite the inconsequential size of the defendant's investment, if it appeared that the fence or other structure actually served a useful purpose.⁸⁰¹

It is true that in *Tuttle v. Buck*⁸⁰² it was held that a complaint stated a cause of action which alleged in substance that the defendant, a banker, for the sole purpose of ruining the plaintiff's business, hired barbers to operate a shop in competition with the plaintiff's barbershop, paying them wages in excess of the receipts from patronage. It cannot, however, be assumed that if the case had gone to trial the plaintiff would have been able to persuade the trier of the fact that the defendant's malicious motive for investing in the competing enterprise was his sole motive or even his primary motive, unless it appeared that he closed his shop shortly after the plaintiff went out of business. *Tuttle* therefore cannot be cited as a case in which a defendant, despite his substantial investment, was subjected to substantial loss because of his malicious motivation.⁸⁰³

The gravity of the risk of loss consequent upon erroneous findings as to the motive of a party involved in riparian rights litigation is further diminished by the probability that a sizeable fraction of the cases in the riparian field in which the party harmed might have some basis for a charge of malice against his adversary would involve waste of the water by the latter, and could therefore be decided without need to consider motivation on the firm ground that an alteration in or use of a body of water resulting in unnecessary and harmful waste is unreasonable as a matter of law.⁸⁰⁴

But even if it be assumed that the risk of loss from erroneous findings as to motive is as small as suggested above, it must be admitted that in *Rideout v. Knox* Justice Holmes said:

"It may be assumed, that, under our Constitution, the Legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner."⁸⁰⁵

And it must also be conceded that this statement appears to lend considerable support to the view that legislation which imposes such a risk on a riparian owner could not be upheld as a valid exercise of the police power. It should be noted, however, that Justice Holmes was speaking of legislation purporting to subject to such a risk the privileges and rights of an owner of land with respect to his land rather than of legislation purporting to subject to such a risk the privileges and rights of a riparian owner of land with respect to the water of the lake or stream to which his land is riparian. It should also be noted that in other cases,⁸⁰⁶ including a later one in Massachusetts,⁸⁰⁷ the courts appear to have taken the position that whereas the common law privileges and rights of a landowner cannot be diminished by proof that his claim to exercise or enforce them is maliciously motivated, the extent of common law riparian privileges and rights can be curtailed by proof of such motivation, because their owner has only a usufructuary interest in rather than ownership of the water with respect to which they exist. From these premises it would seem to follow that the power of a legislature to curtail the riparian privileges and rights of a maliciously motivated riparian owner would be greater than its power to impair the privileges and rights of a maliciously motivated landowner with respect to the land he owned; and that it is therefore at least debateable whether *Rideout* need be viewed as an authority casting doubt on the constitutionality of par. g.

Of course, even though the risk of loss from erroneous findings as to motivation which would be imposed on a riparian owner by par. g. appears to be small, and even though it be assumed that *Rideout* does not raise a serious doubt as to the constitutionality of par. g., a riparian owner should not be subjected to that small risk unless it is outweighed

by the public advantage which would accrue from the enactment of par. g. It is submitted, however, that this condition would be fulfilled. The courts have not only recognized the importance of the interest which the public has in the amicable and proper adjustment of the privileges and rights of neighboring land owners as among themselves, and in the discouragement of the devotion of land and water to the service of malicious purposes, but have actually held that the enactment of legislation reasonably adapted to the furtherance of these interests can be a valid exercise of the police power.³⁰⁸ Granted that impairment of private property interests in order to provide something for public use or to enhance the value of some governmental enterprise is often held to be compensable and to require resort to eminent domain rather than to the police power,⁸⁰⁹ it would be surprising if a court struck down par. g. the ground that such were its purpose and effect. This paragraph, like other provisions of the Harmful Use Bill already discussed, can derive strong analogical support from the cases upholding the constitutionality of zoning legislation;⁸¹⁰ especially since, as already pointed out, the direct curtailment of the riparian interest which par. g. would effect is so negligible,³¹¹ and the risk of loss from erroneous findings as to motivation to which it would subject a riparian owner is of such small proportions.⁸¹² True it is that the prospective enforcement of par. g. might disappoint the expectation of a person who had acquired a riparian tract on the assumption that the law would allow him to exercise a riparian privilege or enforce a riparian right to serve a primarily malicious motive; but it seems most unlikely that a court would hold that such an expectation was worthy of protection in view of its obvious conflict with the public interest and of the offsetting benefits which even such an anti-social riparian would derive from his ability to enforce par. g. against others.⁸¹³

But could par. g. be retroactively enforced against a riparian owner who, prior to its enactment and primarily motivated by malice, had effected a harmful alteration in a body of water or had begun a harmful activity in connection therewith which was legal at that time, either because under the common law then prevailing malice was totally irrelevant,

or could not curtail riparian privileges and rights unless it provided the sole motivation for the conduct complained of? If the analogy afforded by the law with respect to pre-existing nonconforming uses were followed it would lead to the conclusion that com. g could be retrospectively enforced only when it was clear that the size of the consequent loss to the defendant would not be unreasonable under all the circumstances.⁸¹⁴

Generally consistent with this conclusion and clearly supporting it in part is the holding in *Rideout v. Knox*,⁸¹⁵ cited with apparent approval in *Camfield v. U.S.*,⁸¹⁶ that retroactive enforcement of the Massachusetts statute forbidding the maintenance of a spite fence would be constitutional against a defendant who at relatively small expense had erected such a structure prior to the statute when it was lawful to do so. In *Rideout*, Justice Holmes said:

"Whether the statute is constitutional with reference to fences already in existence when the act was passed, is a more difficult question. We are compelled to construe the act as applying to all fences maintained after it goes into operation. If a fence which was built before the act, and is simply allowed to stand, may be found to be a nuisance, and abated at the expense of the owner, there is a taking of property without compensation which is more marked and significant than in the case of a simple prohibition to build...On the

whole, having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are of the opinion that the act is constitutional to the full extent of its provisions."⁸¹⁷

But as Justice Holmes emphasized the little harm which retroactive enforcement would cause the defendant in the case before him, and as he also said in substance, as previously pointed out,⁸¹⁸ that a statute which forbade the erection of stores or houses with malicious intent could probably not be enforced even prospectively,⁸¹⁹ it would seem to follow that it would normally be held unconstitutional to require a defendant to demolish a large and expensive structure or installation which he had erected prior to the enactment of par. g., because such a requirement would be unreasonable under all the circumstances.

c. Constitutionality of the Harmful Use Bill Provision
Relaxing Restrictions on Alterations and Activities
of a Riparian Owner for the Benefit of His Non-
Riparian Land.

While opinions vary as to the constitutionality of a statute authorizing a harmful alteration of a lake or stream or a harmful activity in connection therewith for the benefit of non-riparian land subject only to the condition that such alteration or activity be reasonable under all the circumstances,⁸²⁰ there can be little doubt as to the constitutional validity of sec. 429-1 (ell) of the Harmful Use Bill which provides in substance that if an owner of land riparian to a body of water has the privilege of effecting a certain harmful alteration in it or of carrying on a certain harmful activity in connection with it to further the use or enjoyment of his riparian land, he may, in lieu of the exercise of that privilege, effect that alteration or carry on that activity for the benefit of non-riparian land owned by

him, provided the substitution of his non-riparian land for his riparian land as the beneficiary of the privilege does not cause greater harm to others, or require a greater alteration in or activity in connection with the body of water than would have been caused or required if such substitution had not been made.⁸²¹ And this would appear to be the case regardless of whether or not secs. 429-k and m were held to be constitutional.

It is true that a riparian owner attacking sec. 429-1(e11) could argue that it purported to permit an alteration or activity for the benefit of non-riparian land, although harmful to him, and so would curtail his common law right that no use of the water harmful to him be made on non-riparian land.⁸²² But the violation of this right which sec. 429-1(e11) would authorize is clearly technical rather than substantial, because the section does not purport to legalize all non-riparian uses, if reasonable, but would merely allow a harmful use for the benefit of non-riparian land only if that use would be no more harmful to a complaining riparian than it would have been if it had been lawfully made for the benefit of riparian land pursuant either to secs. 429-k and m if held constitutionally valid or pursuant to the New York common law if those sections were stricken down. A harmful use on non-riparian land would seem to be the substantial legal equivalent of a harmless use when it involved no more harm to the objecting riparian than he would have sustained from a harmful riparian use to which he could not object because valid either under secs. 429-k and m or at common law. Since, therefore, sec. 429-1(e11) can, like sec. 15-0701, be characterized as a Harmless Use Bill, the considerations which demonstrate the constitutionality of sec. 15-0701 would appear to establish the constitutionality of sec. 429-1(e11) as well.⁸²³

Even if a court should conclude that its enactment would prejudice riparian owner A because it would subject him to the risk of loss which would be caused him if a trier of the fact should make an erroneous finding as to whether the harm caused him by the alteration or activity of riparian owner B for the benefit of B's non-riparian land was no greater than the harm A would have suffered if B's alteration or activity had been for the benefit of his riparian land, and that the diminution

in A's riparian interest which sec. 429-1(e11) would effect was therefore, as a practical matter, substantial rather than merely technical, the court could still and probably would uphold the section as a valid exercise of the police power on the strength of the considerations which point toward a similar conclusion with respect to the constitutionality of secs. 429-k and m of the Harmful Use Bill.⁸²⁴

Sec. 2. Constitutionality of the Harmful Use Bill under a Sovereign or Reserve Power in the State Derived from its Ownership of the Beds of Certain Lakes and Streams.

If it be assumed for the sake of argument that enactment of the provisions of the Harmful Use Bill legalizing substantially harmful alterations in and activities in connection with lakes and streams if reasonable, and establishing the relevance of the public interest and of the motivation of the actor when determining reasonableness would, like the provision authorizing the use under certain conditions of lake or stream water by a riparian owner for the benefit of his non-riparian land, effect uncompensated change in the common law riparian interests of its private citizens;⁸²⁵ and if it also be assumed that the effectuation of such change could not be upheld as a valid exercise of the state's police power,⁸²⁶ the question remains as to whether the state, in addition to its navigation and police powers, has a power over waters within, traversing or bordering the state, which is broad enough to enable it to effectuate this uncompensated change without violating the due process clauses, even though the change could scarcely be said to have been made in furtherance of navigation. That the answer to this question appears to be uncertain was indicated in a report of the Cornell Water Resources Center to the New York Temporary State Commission on Water Resources Planning under date of March 31, 1966. Although space limitations prevent not only the incorporation in this book of that lengthy report, but also preclude the discussion of most of the numerous cases dealt with therein, the possibility that the New York courts might ultimately answer the question in the affirmative in cases in which the state owns the bed of the body of water involved justifies at least brief consideration of it here.

Among the New York judicial opinions affording considerable support for such an answer are those written by the Appellate Division of the Supreme Court and the Court of Appeals in *State of New York v. System Properties, Inc.*⁸²⁷ In this case it appeared that the defendant System Properties was maintaining a dam across the Ticonderoga River, the sole outlet of Lake George, and that this dam had raised the level of the lake. The state, alleging that the dam interfered with navigation and enjoyment of the waters of the lake, sought a judgment declaring it to be the sovereign owner and the owner in fee of the bed of the river including the site of the dam; that the river and lake are public navigable waters; and that the state has and is bound to exercise the reserve power to regulate and control in the public interest the waters of the lake and river. The state withdrew its request for a decree directing the removal of the dam. Intervening as defendants were several counties, other governmental bodies, and the Lake George Association, composed of several hundred riparian owners on Lake George. Intervening as plaintiffs were a few individual riparian owners on the lake, who sought a judgment requiring the dam's removal.

The trial court, without giving the declaratory judgment requested by the state, decided that it would be for the best interests of all parties to have System Properties continue to maintain and operate its dam, provided the dam was so operated that the range of fluctuation of the water level of the lake was kept within limits prescribed by the court.⁸²⁸ The state and the individual riparian plaintiffs appealed. The decision was reversed by the Appellate Division on the ground that while System Properties owned the dam site, the state had the regulatory and controlling power it claimed, and had not delegated that power to the courts. The claim of the individual riparian plaintiffs that the dam should be removed was rejected on the ground that their rights as riparian owners with respect to the lake level had been destroyed by the acquisition by System Properties of prescriptive flowage easements.⁸²⁹ The state appealed from the judgment that System Properties owned the dam site; the intervening riparian plaintiffs appealed from the decision that their riparian rights as to the lake level had been extinguished by

prescription; and the defendants Trustees of Dartmouth College⁸³⁰ and Lake George Association appealed from the judgment that the trial court did not have power to fix the lake level, contending that until the legislature acted, the courts could decide what it should be.⁸³¹ The several governmental bodies which had intervened as defendants did not appeal.

The Court of Appeals briefly summarized its conclusions in the following language:

"Although both the lower courts passed on the question of navigability of the river, we consider that, in view of the other determinations with which we agree, a decision on navigability is in this situation neither necessary nor appropriate. We are holding herein, as explained below, that Dartmouth owns the dam site but that the State of New York has power to regulate the use of Lake George and the Ticonderoga River in the public interest. Those ultimate holdings are not affected by and do not depend on navigability or nonnavigability."⁸³²

When System was before the Appellate Division that court, after declaring that the state owns the bed of Lake George in its sovereign capacity, said:

"The sovereign power of the State is not limited to regulation in the interest of navigation but extends to every form of regulation in the public interest, including the regulation of the use of the lake as a means of recreation and enjoyment and as a source of water power. We adopt as expressing our views the exposition of the scope of the State's power...in Niagara Falls Power Co. v. Duryea (185 Misc. 696,705)."⁸³³

Duryea was an action for a declaration under Art. 15 of the Real Property Law, now Art. 15 of the Real Property Actions and Proceedings Law, that Sec. 15-1701 of the Environmental Conservation Law providing for the imposition of a rental charge on persons using waters of the state of which it has proprietary ownership, was invalid insofar as it purported to impose a rental on water which the power company claimed it had been

taking prior to the statute and was continuing to take as a vested property right by virtue of its privileges as a riparian owner and of grants from the state. In declining to make the declaration sought and in holding that the statute could be constitutionally enforced against the company, the court spoke as follows (the part of its statement which is quoted in the Appellate Division opinion in *System* is italicized):

"The essential question is whether the company has acquired a 'property' right in the use of the water which may not be taken away by the Legislature without compensation. The plaintiff contends that a right of diversion exists in the Niagara in its favor, even though it may be conceded that the State has some proprietary right in the bed and waters of the river and some jurisdiction over them. The right of diversion exists, so the argument goes, because of the riparian ownership of the bank of the river with the consent to the use of the water by the State as downstream riparian owner and owner of the bed and the waters; because of the title to land under water acquired by the plaintiff from the State, and because of the specific grants of right by statute...The area in which the sovereign takes precedence over the riparian owner in public waters is very broad. No damage arises from interference with riparian rights where a public use in the interests of commerce as well as navigation may be discernible. (Matter of City of New York (Jamaica Bay), 256 N.Y. 382,385)...Where the State owns the bed of the stream, it is not answerable to a riparian owner for the diversion of the water (The People v. The Canal Appraisers, 33 N.Y. 461). The diversion there was for the public use of the State for canal purposes. The decision does not seem to turn on the nature of the public use, but on the general precedence of the State over a private riparian owner...Other rules apply when the State is not the owner of the bed of the stream and when the stream is not composed of public waters in the sense that the Hudson and Niagara are public waters. In such a case the State may act to improve navigation in the natural channel without compensating the owners of the bed and bank...

Where the bed (of a lake) is privately owned, water may not be diverted, except for navigation, even though the use may be for another public purpose, as a municipal water supply (Smith et al v. City of Rochester, 92 N.Y. 463). The Niagara River is a public and international boundary stream, the bed of which is owned by the State and the water subject to its control, and it is treated as a navigable stream even at the point of the falls (see Niagara Falls P. Co. v. Water P. & C. Comm., 267 N.Y. 265, supra). There can be no doubt of the right of riparian owners to use this water, but when the use of the water is resisted by the State in the interests of navigation, the private use must certainly yield to the sovereign's judgment of necessity. In addition to its power to control and regulate navigation, the State has general rights of regulation of the water in the public stream in which it owns the bed. The important point in this case is whether this kind of power, exercised over the water by the sovereign, beyond the point of controlling navigation, is the kind of power which cannot be yielded beyond reassertion, under any contract, license or consent between the State and a private citizen. In granting rights to lands under public waters, the sovereign always does so with the limitation, whether expressed or not, that its public functions and obligations in the water cannot be impaired. The State cannot yield this part of its sovereign and public obligation...Merely because the power to act in the interests of navigation arises so often in litigation and is so often suggested as a form in which the sovereign power in public water is to be exercised above private rights, it is not to be supposed that this is the only form in which public powers are to be exercised over public waters and to which private interests may be required to yield...in Matter of City of Syracuse v. Gibbs (283 N.Y. 275), the statutory grant of the right of a city to use water for its waterworks was subjected to the duty of the State to control and conserve its water resources for the benefit of all its inhabitants, and it was thought that any broader statutory grant of rights to the water would be invalid

and unconstitutional. The power of the State so to dispose of its water resources that they shall be distributed in the public interest notwithstanding special statutory provisions, special grants or special rights was treated as the 'reserve power' of the State in Matter of City of Syracuse v. Gibbs (supra). It is the same 'reserve power', I think, that Judge Finch referred to in Niagara Falls P. Co. v. Water P. & C. Comm. (267 N.Y. 265,276), when he used the expression 'the reserve power to preserve the water of Niagara river for commerce and navigation and in the interests of the public.' I am unable to distinguish the power of the State thus expressed, over public water in the public interest and its power in the interest of navigation. I do not think they are distinguishable. No one would doubt that the State could interfere with the plaintiff's riparian rights, or even destroy them in the interest of navigation in the river. And it is not very much more doubtful that if the State has the power to act in the preservation of public water in the public interest, it may do so in the direction of preserving the people the energy of Niagara Falls by a clearly expressed statute for that purpose regardless of the rights it may have previously created, permitted or allowed in these waters."⁸³⁴

After quoting the italicized parts of the above excerpt from the opinion in *Duryea*, the Appellate Division said in its opinion in *System*:

"We therefore conclude that the title to the dam site is in the defendant *System*. This title is, of course, subject to the reserve power of the State to regulate the Ticonderoga River as a navigable river and it is also subject to the additional rights of the State, growing out of the fact that the river is the outlet of Lake George and that obstructions in it may affect the level of Lake George."⁸³⁵

In the Court of Appeals opinion in *System* the Appellate Division position as to the power of the state to regulate and control the lake and river was approved. The court said:

"As to the existence of the sovereign power of the State as declared by the Appellate Division we have no doubt (see *People v. New York & Staten Is. Ferry Co.*, 68 N.Y. 71). Lake George is a large (44 square miles) and important body of water, title to which and sovereign power over which is in the State (*Granger v. City of Canandaigua*, 257 N.Y. 126, 130).⁸³⁶ The reach of that power in trust for the People is as great as the uses and possibilities of the lake for navigation, as a water-power reservoir and not excluding recreational uses (see *Hudson Water Co. v. McCarter*, 209 U.S. 349, 356, 357; see *Granger v. City of Canandaigua*, *supra*, p. 131). Exercise of those rights includes control of the river and, as against this sovereign right and responsibility, the dam operator could never acquire any such prescriptive rights as would interfere therewith (*Matter of Long Sault Development Co.*, 212 N.Y. 1, 9, 10). To say that Dartmouth has by prescription or otherwise established a right to back up the lake waters would be to deprive the State of its inalienable right (*Niagara Falls Power Co. v. Water Power & Control Comm.*, 267 N.Y. 265; *Matter of Long Sault Development Co.*, *supra*)....We agree, too, with the Appellate Division that by reason of the substantially continuous flooding caused by the dam...the riparian owners have lost their former right to prevent such flooding. But the State's own rights being sovereign in character remain unimpaired and there is no reason to suppose that the Legislature will neglect to exercise them as its collective judgment dictates."⁸³⁷

In view of the decision rendered and the judicial utterances in *Duryea*, which appears to have achieved virtually Court of Appeals rank through its adoption and approval by the appellate courts in System, and in view of the decision and judicial statements in System, it would seem reasonably clear that the present view of the Court of Appeals is that the State of New York has the sovereign or reserve power to impose on the use of lakes and streams bordering, traversing or within its

territory any regulation it sees fit for any public purpose whatsoever, and without making compensation to riparian owners harmed by such imposition, if the lake or stream is navigable and if its bed is owned by the state.⁸³⁸

Although neither the Appellate Division nor the Court of Appeals' opinion in *System* states expressly that the existence of the state's sovereign or reserve power is dependent upon its ownership of the bed of the lake or river involved, there are bases for the inference that both courts believed this to be the case. In the first place, it was pointed out in the *Duryea* opinion, of which they expressed approval, that "other rules apply when the State is not the owner of the bed of the stream."⁸³⁹

In the second place, the Appellate Division pointed out that the state owned the bed of Lake George, and the Court of Appeals declared that the title to that lake is in the state, by which it probably meant that title to the bed of the lake is in the state.⁸⁴⁰ If these courts had not believed that such ownership was essential to the existence of the state power which they were recognizing, it seems unlikely that they would have given it prominence. And finally, both courts were undoubtedly aware of the fact that the legislation declarative of the state's power over certain waters contains in several of its sections a provision limiting it to waters "the bed of which...is vested in the state."⁸⁴¹ Although neither the Appellate Division nor the Court of Appeals referred to this fact, it seems probable that they would have hesitated to extend the scope of the state's sovereign or reserve power over waters beyond the limits fixed in this legislation; and that if they had indeed decided to go to such a length, they would have called attention to what they had done, and given their reasons for doing it.⁸⁴²

Support for interpretation of the *Duryea* and *System* decisions as affirming the existence of such a sovereign power in the State of New York is afforded by *Niagara Mohawk Power Corp. v. Federal Power Commission*, an action brought after *Duryea* and while *System* was going through the courts and in which it was necessary to decide whether or not the State of New York had terminated the water power privileges of the corporation in the Niagara River, the east half of the bed of which is owned by the State of New York.⁸⁴³ The court said:

"Under the law of New York a riparian owner's right to use the waters of a stream for power purposes is a part of his estate...This usufructuary right is an incident to riparian ownership and does not depend upon grant or prescription. It is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor; but, until the State exercises its paramount right the riparian owner's usufructuary right is unimpaired. These principles were stated by the New York courts in *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company v. Smith*...Since the usufructuary property right of Niagara Falls Hydraulic and its successors was and is subject to the superior right of the State of New York, in order to see whether the right still exists it is necessary to ascertain whether the State has exercised its paramount authority and, if so, to what extent...From the various legislative enactments to which we have referred, it is seen that New York has exercised its sovereign paramount authority to regulate the use of Niagara waters by restricting the original riparian rights upon which the Pettebone-Cataract and International Paper rights depend. It has limited the quantity of water which may be used, and has exacted a rental charge for its use. But the legislature has not destroyed the riparian rights, as it might have done by pre-empting the entire available flow; rather it has confirmed the rights as limited and defined in the several statutes."⁸⁴⁴

Further support for the assumption that Duryea and System recognize in the State of New York a sovereign or reserve power over the navigable waters of the state, when the beds are state owned, which power it may exercise for the furtherance of any public purpose is afforded by the following quotation from *Andrews v. State of N.Y.*, which was an action to recover compensation for the taking by the state of land riparian to the St. Lawrence River, the south half of the bed of which is owned by the State of New York.⁸⁴⁵ The court said:

"The St. Lawrence River is a navigable stream and as such it is subject to the control and regulation of the United States and the State of New York in the interests of commerce and navigation...Under these circumstances no damage arises from interference with riparian rights where the public interests in commerce and navigation are present. Destruction of the access of a riparian owner to the navigable channel or even diversion of the water will not give rise to any claim for damages...This power to so control, regulate and change the water resources of the State has been held to extend to any area of public interest and is not limited solely to improvement of navigation.⁸⁴⁶ (Niagara Falls Power Co. v. Duryea, 185 Misc. 696; People v. System Properties, 2 N.Y. 2d 330.)"⁸⁴⁷

Also indicating concurrence in the above suggested interpretation of Duryea and System is their citation by T. R. Lee, Counsel in Charge of the Water Supply Section of the Condemnation Division of the Law Department of New York City as sustaining the proposition that "New York has authority over water within the state which extends beyond the mere regulation of navigation, at least in the cases of bodies of water under which the state owns the land."⁸⁴⁸

But could the exercise of the state powers recognized in Duryea and System be upheld as against a riparian owner who was harmed thereby and who claimed that it impaired his riparian privileges and rights without compensation in violation of the 14th amendment to the federal constitution? If the State of New York possessed these powers from the beginning of its existence, so that all New York riparian interests were subject to them as soon as they were acquired, this question could be answered in the affirmative; for it was held in St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners⁸⁴⁹ that the 14th amendment did not require the defendants, who had diverted water from the Mississippi River for municipal supply, to compensate the riparian owners harmed by the diversion, because each state has the power to formulate the law governing the waters within its borders, and because

private riparian interests in Minnesota had always been subject to the power of the state to divert water from navigable rivers for a public purpose without making compensation to riparians harmed by such an act. If, on the other hand, the Duryea-System doctrine effects a change in the New York law existing prior to its promulgation, the question can arise as to whether the change is one which the New York courts could constitutionally make.⁸⁵⁰ It is therefore important to determine, if possible, whether Duryea and System merely applied existing New York law or whether they altered it.

Among the authorities tending to support the position that New York State has always had the sovereign or reserve power recognized in Duryea and System are the following:

Gould v. Hudson River Rr. Co.⁸⁵¹ in which the court held that the plaintiff could not recover damages from the defendant because of its construction of its road under legislative authority in the bed of the Hudson River between high and low water marks in such a way as to cut off the plaintiff's access from his riparian land to the river channel. The court quoted with approval the statement in Lansing v. Smith⁸⁵² that "the bank of the Hudson between high and low water mark belonged to the people", and concluded by saying:

"The legislature has the right to regulate and control all navigable waters within the state, as, in their judgment, the interest and convenience of the public may require. It is not upon the ground alone of improving the navigation of such waters, but on the ground that they possess the power, and can exercise it, for any public improvement, such as is the construction of a railroad, or the laying out of a public highway."⁸⁵³

Although this statement does not expressly condition the state's power of regulation and control of the river on the state's ownership of its bed, the fact that the court took the trouble to point out the existence of such ownership should not be overlooked when deciding for what holding the case stands.

People v. Tibbetts in which it was held that the state could execute a valid lease of the water power of the Hudson River and require the payment of rent therefor. The court said:

"It is admitted, in the printed points of the counsel for the defendant, that the State, in its sovereign character, owns the bed of navigable streams to high water-mark, and that the right of a riparian owner is subservient to the power in the State to abridge or destroy it at pleasure; and the counsel rightly supposed that it was so decided in Gould v. The Hudson River Railroad Company (2 Seld., 522). The riparian owner may undoubtedly use the water passing or adjoining his land for his own advantage, so long as he does not impede the navigation, in the absence of any counter-claim by the State as absolute proprietor. But the State may, as such proprietor of the waters,⁸⁵⁴ grant them, or any interest in them, to an individual... It is beyond dispute that the State is the absolute owner of the navigable rivers within its borders, and that, as such owner, it can dispose of them to the exclusion of the riparian owners. In this case, the State exercised its power of disposition in making the lease, and, consequently, such lease is valid."⁸⁵⁵

While in Tibbetts as in Gould the court did not expressly condition the state's power on its ownership of the river bed, it should be noted that the court was careful to refer to it.

People ex rel. Loomis v. Canal Appraisers in which it was held that the state was not liable to a riparian owner for harm caused him by the state's diversion of the Mohawk River for purposes of the Erie Canal. The court said:

"Upon the separation of the colonies from the crown of Great Britain, the people of this State succeeded to all the right of the British crown to lands within its territorial jurisdiction, and prima facie being the owners of the lands covered by the waters of the Mohawk River they can use those waters for any purpose."⁸⁵⁶

The court concluded by distinguishing *Commissioners of the Canal Fund v. Kempshall*,⁸⁵⁷ in which the plaintiff obtained a recovery, on the ground that he held title to part of the river bed under a state grant.⁸⁵⁸

People ex rel. Niagara Falls Hydraulic Power & Manufacturing Co. v. Smith in which it was held that the power company's privilege to use the water of the Niagara River for manufacturing purposes was taxable as a property right rather than as a franchise, the court said:

"The relator, as a riparian owner and as owner of the lands under the waters of the Niagara river adjacent to its uplands from which the water is immediately taken, has the right to the use of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it does, after passing over its own lands..., subject only to the paramount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream, such right being in no sense in the nature of a franchise but a corporeal hereditament, not depending either upon grant or prescription... And this view of the relator's rights is confirmed by the act of 1896...which in terms confirms and defines the riparian rights of the relator and is wholly inconsistent with the claim of the relator as to the nature thereof. The fact that the State might destroy relator's riparian rights does not convert such right into a mere franchise. Interference with the relator's rights by the State is a contingency too remote to require serious consideration...Niagara River, at all the points affected by the exercise of the relator's rights, is an unnavigable stream and will so remain, and when it is considered that not even the State is at liberty to interfere with the riparian rights of the relator arbitrarily, but that such interference, if attempted, must be

in the interest of some substantial right of the State affected by the exercise of the right of the relator to use the waters of the river, the claim of the relator appears to be wholly unfounded."⁸⁵⁹

Granger v. City of Canandaigua,⁸⁶⁰ an action to restrain the city from filling in land, apparently under state authority or with state acquiescence, under the water of Canandaigua Lake for park purposes. The court took the position that the judgment rendered below for the defendant would have to be affirmed if the title to the lake bed was found to be in the state, and held that it was in the state in trust for the people. The court rejected plaintiffs' claim of title based on succession to the interest which the State of Massachusetts acquired by a grant from New York of territory including the underwater land in question, but reserving to New York the government, sovereignty and jurisdiction over the land granted.⁸⁶¹ The court said:

"The question becomes ultimately one of practical construction. Here the plaintiffs and their predecessors in title had not, for more than one hundred years, asserted title nor exercised any act of ownership over the bed of the lake until they brought this action. Canandaigua Lake is large as lakes and ponds go... Canandaigua is navigable for commercial purposes. It is longer and wider than Hemlock. The question here is not one of riparian ownership. Plaintiffs claim title independently of the adjacent owners. To hold that the sovereignty had dedicated the bed of such a lake to private uses, subject to rights of navigation only, would be not only to deprive the public of access to the water for recreation and enjoyment but also to deprive the riparian owners of their customary privileges"⁸⁶²...Except as applied to comparatively small and narrow bodies of water, resembling rivers, rather than lakes, it seems...contrary to our institutions to say that our fresh water lakes are the subject of private ownership."⁸⁶³

It would appear then that Granger could be interpreted as holding that New York's reservation of sovereignty in its grant to Massachusetts constituted a reservation of the title to the beds of the large lakes within the territory granted to Massachusetts. It will be noted, however, that the court did not hold, at least expressly, that when New York owns the bed of a body of water, it has a sovereign or reserve power over it derived from such ownership; and it will also be observed that it was not necessary to render such a holding in order to arrive at the judgment in favor of the city. The sovereign or reserve power involved in Granger, it could be argued, was viewed by the court as the cause rather than the result of bed ownership by the state, since the power was apparently based on the express reservation of sovereignty in the grant to Massachusetts rather than on bed ownership. Moreover, as the plaintiffs were not claiming title to any of the lake bank but only to its bed, they could not qualify as riparian owners or claim protection for any riparian interest in the waters of the lake. Thus the efficacy of the state's sovereign or reserve power as against riparian interests was not in issue in Granger. Again, if their claim of title to the bed of the lake should fail, they would be in no position to object to the city's intrusion upon it, because it was not in their actual possession when the intrusion occurred, and because lack of title would prevent them from showing that they had constructive possession at that time. While in view of these considerations it seems clear that Granger could be cited in support of a holding that New York State has a sovereign or reserve power which enables it to control and regulate the use of any large lake which, like Canandaigua, lies in the territory covered by New York's grant to Massachusetts, the amount of support which Granger gives to the holding in System that the state has such a power over Lake George, which does not lie in that territory, seems doubtful, regardless of whether in System the existence of such power is based on the state's ownership of the lake bed, as suggested above, or on some other foundation.

Niagara Falls Power Co. v. Water Power & Control Commission ⁸⁵⁴ in which it was held that the commission could require the power company to pay rent for the use of water which it was withdrawing from the Niagara

River for power purposes pursuant to previous legislation authorizing such withdrawal and imposing no rental charge. Although the trial court in Duryea and the Appellate Division in System appear to have relied on Niagara Falls as establishing a reserve power in the state to control and regulate in the public interest the use of the water of a river of which it owns the bed, and although such reliance seems justified to a degree by the court's statement in Niagara Falls "that the State likewise has the reserve power to preserve the water of Niagara River for commerce and navigation and in the interests of the public,"⁸⁶⁵ it should be borne in mind that the court was speaking of the state's reserve power with respect to water privileges granted by statute rather than of the state's reserve power with respect to a riparian owner's common law privilege to use water for power, which he possesses although the state has not expressly granted it to him.⁸⁶⁶ In short, it would seem that in Niagara Falls, as in Granger, the question as to the state's power to impair common law riparian privileges and rights to serve a public interest other than that in navigation was not passed upon. It should also be noted that in Niagara Falls the court offered another basis for its decision: viz., that the power company, reorganized under Laws of 1918, chap. 596, had accepted the obligations imposed on it by that statute as well as the benefits it conferred,⁸⁶⁷ and, as contended by the attorney general, had bound itself by a compact with the state.⁸⁶⁸

It could be argued, of course, that if the legislature, acting in the public interest, has the reserve power to impose conditions upon or to otherwise reduce water privileges which it had previously granted by statute, it would also have the reserve power to impair common law riparian privileges when acting to further some public interest, since a riparian owner's common law riparian interest has its origin in a grant of riparian land by the state, and since a grant of water privileges and a grant of land can be looked upon as analogous. But if the trial court in Duryea and the Appellate Division in System were thinking along these lines when they cited Niagara Falls they did not reveal that fact; their emphasis being put on the indication in Niagara Falls that the state's reserve power could be exercised for purposes other than the furtherance

of navigation rather than on the question as to whether common law riparian interests as well as water privileges created by statute are subject to the state's reserve power. Moreover, the argument might be attacked as proving too much; as tending to establish a reserve power in the state to impair the common law property interests of all of its grantees, regardless of whether the land granted is riparian land or ordinary land, and regardless of whether title to the bed of the water involved is in the state or in the riparian owner. And when attempting to predict in what future cases the holding in Niagara Falls will be held to be controlling, the additional basis for it - a contract between the power company and the state implied from the company's acceptance of the terms of the 1918 statute - and the possibility that this second basis might be looked upon as an indispensable basis or at least as the more important basis for the decision in Niagara Falls, should not be overlooked.

Matter of City of Syracuse v. Gibbs,⁸⁶⁹ a proceeding to review a determination of the Water Power and Control Commission as to the amount of water from Skaneateles Lake which the Village of Jordan could use for municipal supply. It appeared in this case that prior to 1931 the legislature had enacted certain statutes authorizing the City of Syracuse to take water for municipal supply from Skaneateles Lake, but subject to state control and to the rights of others, riparian or otherwise; that in 1931 the commission granted the application of the city for permission to take an additional supply from the lake, expressly reserving, however, the right to grant water privileges to other municipalities; that the city accepted and acted upon this permission; that in 1935 the Village of Elbridge applied to the commission for permission to procure water from the lake for municipal supply by tapping the Syracuse mains; that this application was granted; that in 1935 the Village of Jordan applied to the commission for permission to secure its municipal supply from the lake by tapping the Elbridge mains; that this application was granted; that in 1936 the Village of Jordan applied to the Commission for a determination of the amount of water which it was entitled to take; that the commission fixed the amount; that the City of Syracuse sought annulment of this determination on the ground that the commission did not

have jurisdiction to make it, because under the pre-1931 legislation the city had been given absolute power over all the waters of the lake; that the Appellate Division held that the commission lacked jurisdiction; and that the commission had appealed from this judgment.

In reversing the Appellate Division and affirming the commission's determination the Court of Appeals relied principally on four grounds: (1) that the privileges granted the city by the pre-1931 statutes were expressly made subject to state control,⁸⁷¹ as pointed out in *Sweet v. City of Syracuse*;⁸⁷¹ (2) that as held in *Sweet*, it would have been unconstitutional for the state to have granted such privileges without preserving its power of control;⁸⁷² (3) that the state, when acting in the public interest, may, as it sees fit, grant, withhold, or condition the privilege of a municipality to take water;⁸⁷³ and (4) that the city in accepting the privileges granted it by the commission in 1931 also accepted and was bound by the reservation of state control to which the privileges were made subject.^{873a}

But whether Gibbs can be cited as supporting the proposition that the state possesses a sovereign or reserve power to control and regulate in the public interest the use of the large lakes in the state which it could exercise not only as against its governmental subdivisions and agencies but as against riparian owners as well seems doubtful. It is true that the opinion in Gibbs contains the statement that "It was the duty of the State to control and conserve its water resources for the benefit of all the inhabitants of the State. The public right to the benefit of such resources is an incident of sovereignty."; and the statement that "whatever the city got by the statutes upon which it relies was subject to the reserve powers of the State to control, in the public interest, the use of the waters of the lake."⁸⁷⁴ If, however, these statements are interpreted in the light of the four grounds of decision referred to in the preceding paragraph, it would seem reasonable to conclude that what the court actually did was to recognize and uphold a state power, good as against municipalities rather than as against riparian owners. Such a conclusion finds support in the court's reference to the provisions in the pre-1931 legislation making the water privileges

granted subject to the rights of riparian owners, and in its citation of the section of the Environmental Conservation Law requiring the commission, before granting an application, to determine whether provision has been made for the payment of damages to property resulting from action under the permission applied for.⁸⁷⁵ Also consistent with this conclusion is the failure of the court to make any finding as to the ownership of the bed of Skaneateles Lake, which, if the interpretation of *Duryea and System* previously suggested is correct, is a prerequisite to the state's possession of a sovereign or reserve power to impair riparian interests without compensation. It would seem, therefore, that Gibbs lends little support to the assumption that the New York law prior to *Duryea and System* was in accord with the holding in those cases that the State of New York had such a power.⁸⁷⁶

Turning now from the cases which tend in varying degree to support the thesis that the decisions in *Duryea and System* were merely in accord with and involved no change in what had always been the New York law of waters,^{876a} to the cases which tend to contradict that thesis to a greater or lesser extent, the following appear to merit special attention.

Smith v. City of Rochester,⁸⁷⁷ in which the plaintiff sought an injunction restraining the city from diverting the waters of Hemlock Lake for municipal supply. Although the state legislation authorizing the diversion provided that the city was to pay all damages caused thereby,⁸⁷⁸ the city contended that it was privileged to effect it without making compensation to harmed riparian owners, because the state's ownership of the bed and waters of the lake give it complete power over its disposition.⁸⁷⁹ Inasmuch as the Court of Appeals in reversing the Appellate Division's judgment in favor of the defendant held that the lake bed was privately owned,⁸⁸⁰ and that the plaintiff had rights of the sort protected by the terms of the statute,⁸⁸¹ an answer to the question involved in *Duryea and System* as to whether the state had a sovereign or reserve power to control and regulate lakes the beds of which are owned by the state, to further public interests other than its interest in navigation, and without compensation to harmed riparians, was not necessary to the decision of the case. The Court of Appeals,

nevertheless, in the course of its discussion, made statements defining the state's sovereign power which seem inconsistent with an affirmative answer to that question. Thus the court, after finding that New York's grant to Massachusetts under the Treaty of Hartford passed title to the bed of Hemlock Lake to Massachusetts, that the plaintiff was a successor to that title, but that New York had, by an exception in the grant, retained the "government, sovereignty and jurisdiction" over the lake,⁸⁸² spoke as follows:

"It now remains to consider the nature of the rights of property which pertain exclusively to sovereignty and which do not pass to the grantee under a conveyance of the soil bordering upon and adjoining fresh-water navigable lakes and rivers. It may be premised that the mere right of eminent domain always and from necessity resides in the sovereign. It is declared by statute that the State, by virtue of its sovereignty, is deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State...This right confers upon the State the title to such property as may be forfeited or escheated, or the title to which for any reason fails, and also the right to resume ownership and possession of such property as may be required or rendered necessary for public purposes..."⁸⁸³

Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water..."⁸⁸⁴

We have before seen that the sovereign right grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people. We have also seen that they constituted an easement over the lands of the riparian owners for limited purposes, and embracing no right to convert the waters to any other uses than those for which the easement was created...This right, being founded upon the public benefit supposed to be derived

from their use as a highway, cannot be extended to a different purpose inconsistent with its original use. The diversion of these waters for the purposes of furnishing the inhabitants of a large city with that element for domestic uses, and especially to lease them for manufacturing and other purposes, is an object totally inconsistent with their use as a public highway or the common right of all the people to their benefits. We concede that such a use is a public one in the sense that enables a municipal corporation to procure the lawful condemnation of property for that object, but we deny that it is consistent with the purpose upon which the sovereign right is based."⁸⁸⁵

In brief the court in *Smith* clearly takes the position that the state's sovereign power comprises the power of eminent domain, the power to resume possession and control of property when no private person can show title thereto, and the navigation power: viz., the power to control and regulate navigable waters in furtherance of trade and commerce; but does not include the power to control and regulate such waters for other purposes, even though their accomplishment would benefit the public. And since the court in *Smith* does not intimate that the content of the state's sovereign power is larger when the state owns the bed of the body of water involved than when it is privately owned, its dicta can easily be interpreted as in conflict with the *Duryea-System* position as to the law governing the extent of the state's sovereign power when the bed is state owned. The possibility that the court's definition of the extent of the state's sovereign power was intended to apply only to the sovereign power referred to in the grants made pursuant to the Treaty of Hartford and not to state grants which make no express reference to that power, and that the court's definition could therefore have pertinence only in a case involving the content of a sovereign power expressly retained, seems rather definitely precluded by the tenor of the first sentence of the above quoted extract from the *Smith* opinion, which makes it quite clear that the court is addressing its attention to the extent of the sovereign power which remains in the state after any and all state grants of land bordering on

navigable lakes and streams and not merely to those of such grants as refer expressly to the state's sovereign power.

Sweet v. City of Syracuse,⁸⁸⁶ an action in which the plaintiff, a Syracuse taxpayer, sought to enjoin the city from exercising any of the powers conferred on it by a statute purporting to authorize it to take water from Skaneateles Lake for municipal supply, although under an earlier statute the canal board had appropriated the lake for the use of the canal, provided that before taking any water the city increase at its own expense the storage capacity of the lake sufficiently to store in it all of the ordinary flow of its watershed, and acquire or extinguish all water power rights upon the outlet affected by such storage. The statute also provided that the city protect the state against all claims of riparian owners on the lake and its outlet for damages caused by any act which the statute authorized. The act, moreover, expressly declared that the city's right in the water of the lake was subject to superior claims of the state.⁸⁸⁷ One of the plaintiff's contentions was that the authorizing statute was invalid because the legislature did not enact it by a two-thirds majority, and because a provision of the state constitution forbade the appropriation of any public property for a local purpose without the assent of two-thirds of the legislature.⁸⁸⁸ In rejecting this contention the court said inter alia:

"It becomes important, therefore, to determine the nature and quality of the right or interest which the state acquired in the waters of the lake and outlet...Neither sovereign nor subject can acquire anything more than a usufructuary right therein, and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use...The only property right, therefore, which the state acquired or ever had in the waters of Skaneateles Lake and its outlet is the right to use and divert the same in such quantities as may be necessary for the use and operation of the canal...Subject to this paramount right, the riparian owners may use the waters of the lake and

stream for domestic or manufacturing purposes, and the public as a highway for boats and other craft. We think that the conditions of the grant to the city of Syracuse are such that no property right or interest which the state has or ever has had is transferred, lost or impaired. After all the provisions of the statute are executed the state will possess and enjoy every right, with respect to those waters, that it did before and, if this is so, then no public property is transferred by the act from the state to the city. The same result will follow if it be assumed that the state still retains its original proprietary right to the waters and bed of the lake. As such proprietor, simply, it would have no greater right to use or divert the water than any other riparian owner. Its paramount right to so use and divert it is not derived from its original ownership, but from the exercise of the right of eminent domain. The rights thus acquired are broader than any that it possessed or could exercise as proprietor. It is not found that it has any other property in the waters of the lake than was acquired by the appropriation made by the canal board; but if it be conceded that the learned counsel for the plaintiff is right in his contention that the state owns the soil of the bed of the lake such ownership is, nevertheless, subject to every easement and servitude necessary to the use of the water by the other riparian owners, so far as they may be entitled to use the same."⁸⁸⁹ (Emphasis added).

If the Court of Appeals, when passing on the issues involved in Sweet, was aware of the possession by the state of a sovereign power over water, the bed of which is owned by the state, by the exercise of which it could impair riparian interests in such water for purposes other than navigation and without compensating the owners of such interests for their impairment, it said nothing indicative of such awareness. On the contrary, the italicized portion of the above quoted extract from the court's opinion can easily be read as a denial of the existence of such a power; and at least as inconsistent with it. Although because of the provision in the

authorizing statute preserving the superiority of the state's rights, the court did take the position, subsequently confirmed in *Matter of City of Syracuse v. Gibbs*,⁸⁹⁰ that the state could, without giving compensation, deprive the city of water rights which the state had granted to it, it cannot be inferred from this that the court was of the opinion that the state could for any and all public purposes impair riparian interests without compensation in lakes or streams the beds of which are owned by the state. Indeed, despite the fact that the use of water from Skaneateles Lake for canal purposes was in furtherance of navigation, the court seems tacitly to approve the state's decision to obtain its privileges to make such use by eminent domain rather than by attempting to secure it through an exercise of its navigation power.⁸⁹¹ So strict a construction of that power seems basically inconsistent with the view that the state possessed the sovereign power ascribed to it in *Duryea and System*.⁸⁹² In view of these considerations it is submitted that *Sweet* can properly be cited as tending to negative the existence, prior to *Duryea and System*, of a state sovereign power of the dimensions indicated in those cases.

Matter of City of New York (Speedway),⁸⁹³ an action by the owner of land riparian to the Harlem River to recover damages for impairment of his riparian right to access to the navigable part thereof, and of other of his riparian rights, caused by the construction by the city under legislative authority of a public driveway known as the Speedway for non-commercial traffic only and crossed only by bridges solely for pedestrian use, on land between the high and low watermarks of the river and owned by the city by virtue of a grant from the state. The authorizing act provided that the city should acquire "by the necessary means and proceedings" the title to any right in real estate within the lines of the driveway "not extinguishable by public authority."⁸⁹⁴ In support of its holding that the plaintiff's riparian rights were not so extinguishable and that he was entitled to compensation for such harm as he might be able to prove he had suffered because of the impairment of his riparian rights by the construction of the drive, the Court of Appeals said inter alia:

"For the taking of the uplands which projected into the line of said driveway due compensation has been made in these

proceedings and the only question which arises on this appeal is whether the appellant is also entitled to compensation for the taking and destruction of his riparian rights in and to the Harlem River, upon which his lands abutted before the construction of said driveway. The question is raised by proper exception to the ruling of the commissioners 'that the city is the owner of the tideway and, therefore, they cannot make any award for damages for the loss of riparian rights'...What are the reserved rights of the state or municipality as trustee for the public, in and to the tideway and the waters beyond the same? The City of New York, as successor to the right of the crown, has 'absolute power to improve the water front for the benefit of navigation, free from any interference by the riparian owner, whose sole right as against the state or its municipal grantee, as trustee for the public, is the preemptive right to purchase, in the case of sale, when conferred by statute.' (Sage v. Mayor, etc., of N.Y.)⁸⁹⁵...The appellant herein, while conceding the right of the state or the municipality to make improvements for the benefit of navigation, without compensation to riparian proprietors for invasion of their private rights, contends that the construction 'of a speedway,' from which are excluded all forms of commercial traffic or intercourse, is not an exercise of that right, and that, therefore, his riparian rights cannot be taken or destroyed without due compensation...The owner of uplands abutting upon a navigable river where the tide flows and ebbs, takes title only to high-water mark. While he does not own the tideway, or the lands under water beyond the same, he has the easement of passage and the transportation of merchandise, to and fro, between the navigable water and his land; to fish and draw nets; to land boats and to load and unload the same. These privileges are absolute property rights as against all but the state. The state holds the title in fee in the tideway and to the lands under water beyond the same, as trustees for the public in its organized capacity. As such trustee and in the

exercise of its governmental functions it may improve the tideway or the adjacent waters for the benefit of navigation, even to the detriment of abutting upland owners, and without compensation to them. As stated in Sage v. Mayor, etc., of N.Y. (supra), this rule is based upon the principle that 'when any public authority conveys land bounded by tidewater, it is impliedly subject to those paramount uses to which the government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare.' Does this principle of implied or reserved power extend to any public use of the tideway or the waters beyond the same for purposes not related to, or connected with, navigation and commerce? The basis of the theory upon which the trusteeship of the state in our tideways and tidewaters is founded seems to be that there are certain rights of navigation and commerce by water which are common to all and are, therefore, paramount to the rights of individuals...The very implication of the trust upon which the state holds the tideway and tidewaters speaks of the definite purpose for which it was created. If the state may use the waterways for any purpose whatsoever, then it is no longer a trustee, but an irresponsible autocrat. If it may erect upon our tideways or tidewaters any kind of structure that may be suggested by the whim or caprice of those who happen to be in power, it will be possible to destroy navigation and commerce by the very means designed for their preservation and improvement...If the trusteeship of the state in the tideway exists only for the purposes above enumerated, it would seem to follow that when, in the exercise of its general right of eminent domain, the state appropriates the tidewater to uses inconsistent with the trust upon which it is held, that is, to some use not for the benefit of navigation, compensation should be made to the riparian proprietor whose rights have been abridged or taken away. Any other conclusion would necessarily admit the arbitrary and unlimited powers of the state over its tideways and tidewaters

for any and every purpose, whether connected with the subject of navigation or not; and no such admission should find its way into our laws."⁸⁹⁶

The decision in *Speedway* and the above quoted extracts from the opinion of the Court of Appeals in that case indicate clearly that as of 1901 at least that Court did not recognize the existence in the state of sovereign or reserve power to control and regulate the use even of waters the bed of which it owns without making compensation for riparian rights impaired by the exercise of such power, except when exercised for the benefit of commercial navigation. It follows that *Speedway* can be cited as evidence that the *Duryea-System* doctrine has not always been the law of New York. If it be objected that *Speedway* cannot be so interpreted because the title to the bed of the Harlem River was in the City of New York rather than in the state, one answer is that the court measured the power of the city over the water by the power which the state itself would have had, if it had not conveyed the underwater land to the city, just as the court in *Saunders v. N.Y. Central & Hudson River Rr. Co.*⁸⁹⁷ equated the power of the railroad to whom the state had granted land under the Hudson River with the power which the state had before the grant. Another answer to such an objection is that in *Rumsey v. N.Y. & New England Rr. Co.*⁸⁹⁸ the Court of Appeals allowed the riparian owner to recover for the loss of his access to the Hudson River caused by the construction under legislative authority of its roadbed along the shore in front of his land, despite the fact that the state at that time held the title to the bed of the river.⁸⁹⁹

But if it be granted that *Smith v. City of Rochester*, *Sweet v. City of Syracuse*, *Speedway*, and the other cases referred to in connection with them,⁹⁰⁰ tend to negate the assumption that the decisions in *Duryea* and *System* recognizing a sovereign or reserve power in the State of New York to control and regulate in the service of any public interest the use of lakes and streams the beds of which it owns without making compensation to riparian owners whose interests are impaired by the exercise of the power were merely in accord with and involved no change in what had always been the New York law of waters,⁹⁰¹ it will be remembered that there are several cases which in varying degree tend to support such an assumption.⁹⁰²

In view of this apparent conflict in the New York cases decided prior to *Duryea and System* what answer should be given to the question previously raised as to whether the exercise of such a power could be upheld as against a riparian owner who was harmed thereby and who claimed that his riparian interest had been impaired without compensation in violation of the 14th amendment to the federal constitution; bearing in mind when considering this question that it can be answered in the affirmative if the State of New York possessed this power from the beginning of its existence, or even if the power came into existence later on through judicial decision, if such a change in the law was one which a court could constitutionally effect.⁹⁰³

Since it is uncertain what the New York law as to the existence of the power under consideration was prior to *Duryea and System*, and since any prediction as to what a New York court might today decide that it was would be highly speculative, it would seem advisable to consider the effect on the riparian owner's claim of two conceivable conclusions that might be reached in this regard if it were decided that in *Duryea and System* the courts did something more than apply existing New York law. One conceivable conclusion could be that although *Duryea and System* effected a change in existing law, that law was so obscure for so many years that no riparian owner could reasonably have relied on it or expected that his riparian interest would be protected against the exercise of the sovereign or reserve power finally recognized in *Duryea and System*. The consequence of such a conclusion would seem to be that a riparian owner harmed by the exercise of such power could not successfully claim that he was entitled to compensation under the 14th amendment, for the courts, as already noted, have the power to change the common law retroactively by their decisions, except when the change attempted would, if sustained, disappoint well founded expectations of property owners to an unreasonable degree.⁹⁰⁴ Another conceivable conclusion as to what the courts did with respect to existing law in *Duryea and System* could be that their judgments neither confirmed nor altered existing law, but merely clarified it. In support of this position it could be argued that although the rights of the parties to the cases prior to *Duryea and System* were, of

course, fixed by the judgments in those cases, it is impossible to arrive by induction from the earlier decisions at any rule generally applicable to other cases. The consequence of such a conclusion would be the same as the consequence of the conclusion first referred to above: viz., that the riparian owner's claim that he was entitled to compensation under the 14th amendment would be rejected; for he would have even less justification under the second conclusion for basing any expectations on the existence of a rule contrary to that laid down in *Duryea and System* than he would have under the first conclusion.⁹⁰⁵

It is submitted therefore that a proponent of the constitutionality of such sections of the Harmful Use Bill as would effect uncompensated impairment of the riparian interests of private parties owning land riparian to bodies of water the beds of which are state owned, could rely not only on the proposition that the enactment of such sections would constitute a valid exercise of the state's police power,⁹⁰⁶ but could also successfully maintain that it would constitute a valid exercise of the state's sovereign or reserve power. The equitable adjustment of the privileges and rights of such owners as among themselves by permitting substantially harmful alterations in and activities in connection with bodies of water, when reasonable under all the circumstances; by establishing the relevance to the issue of reasonableness of the public interest and of the actor's motive; and by authorization of the use of water by a riparian owner on his non-riparian land when such use will not worsen the position of other riparians, would surely constitute the accomplishment of a public purpose in view of the public benefit which would be derived from such an adjustment,⁹⁰⁷ and so would be one for which the state's sovereign or reserve power could be exercised.

Indeed it should be easier to establish the constitutionality of the Harmful Use Bill provisions in question by invoking the state's sovereign or reserve power than by relying on the state's police power. As an attempted exercise of the former need pass but one test to achieve validity, namely, that it be in the public interest,⁹⁰⁸ whereas an attempted exercise of the latter is often subjected to a variety of tests,⁹⁰⁹ the former is exercisable in more situations than the latter.

Thus although it seems to be well settled that it would not be a valid exercise of the police power for the New York Legislature to authorize a city to withdraw water from a lake or stream for municipal supply,⁹¹⁰ even if it owned the underlying bed,⁹¹¹ without making compensation to riparian owners harmed by such withdrawal, because when operating under the police power New York has respected the principle that when an impairment of rights by the state adds to the economic value of a public enterprise, compensation must be made to the harmed riparians, it has been held in other states that under the state's sovereign power or public right water can be diverted for public supply or other public purposes without compensation to riparians harmed by the diversion;⁹¹² and in *Hackensack Water Co. v. Village of Nyack* the court found it conceivable that authorization of an uncompensated diversion for public supply might be held to be within the sovereign or reserve power of the State of New York.⁹¹³

For these reasons the suggestion that the existence of the police power obviates the necessity for recognition in the state of a sovereign power derived from its ownership of the beds of lakes and streams, and that a state's police power has a reach as broad as a state's sovereign power, because in the last analysis the public interest is the measure of the scope of both of these powers,⁹¹⁴ is a debatable one. Although it is undoubtedly true that the public interest plays an important role when the validity of legislation as a police power measure is to be determined, the public interest is not the sole and decisive factor that it appears to be when the validity of legislation as an exercise of the state's sovereign power is in issue. Of course, if in a case in which the state is relying on an exercise of its sovereign power a finding that the legislation under scrutiny is in the public interest can be made only after considering all the factors that are taken into account when deciding whether legislation constitutes a valid exercise of the police power, the scope of the sovereign and police powers would be substantially identical. But that a court would not believe that it was required to follow this method of determining the public interest when the state was relying on its sovereign power is suggested not only by the cases already

referred to in which uncompensated diversion for public supply was held to be a valid exercise of the state's sovereign power, but also by the recent New York decision that the Water Resources Commission can decide that A's proposed use of water is in the public interest, even though he may ultimately be held liable in damages to B for making it;⁹¹⁵ a holding which seems rather inconsistent with the theory that use for public supply without making compensation to harmed riparians could be authorized under the police power merely because it was in the public interest.

It is submitted, nevertheless, that it would be inadvisable for the New York Legislature to resort to the state's sovereign power too readily and too frequently. Property rights should not be substantially impaired without compensation unless the public interest clearly requires such a drastic step. The rising tide of protest against continued adherence to the rule enabling the state to alter navigable lakes and streams in furtherance of commerce without compensating riparian owners for consequent impairment of their riparian interests⁹¹⁶ gives warning of the complaint to which over-use of the sovereign power would give rise. While it would seem proper to sustain the constitutionality of the provisions of the Harmful Use Bill, which would merely effect an equitable adjustment of the privileges and rights of riparian owners as among themselves, by treating them as a valid exercise of the state's sovereign power, if the New York courts should arrive at the unlikely conclusion that such provisions could not be sustained as a valid exercise of the state's police power, it might well be argued, for example, that state authorization of diversion of lake or stream water for public supply without making compensation to riparian owners harmed by the diversion, or the exaction of rent for the agricultural or industrial use of water from a lake or stream, would constitute too drastic a departure from the salutary policies which New York has followed for so many years, and would inflict too much hardship on riparian owners, even when their riparian tracts border on bodies of water the beds of which are owned by the state.

It is true, of course, that if it had occurred to a prospective purchaser of such a tract prior to the decisions in *Duryea* and *System* to ask an attorney whether the state could at some future time, without

giving him compensation, so deal with the body of water to which his land was riparian as seriously to interfere with his enjoyment of it, the attorney would probably have replied that it was clear that the state could so act in furtherance of navigation,⁹¹⁷ and that although the law was not clear as to whether the state could so act in furtherance of public interests other than navigation, a decision by the courts that the state had the power to do so would not be surprising. But it does not follow that most of the thousands of New York citizens who invested in riparian recreational sites prior to the decisions in *Duryea* and *System* are fairly chargeable with notice of this risk. While it is likely that many of them retained attorneys to search the title to the riparian tract in which they were interested, it is probable that it would have been reported defective only if the search revealed that the prospective seller was not the owner of the land involved, or if it were subject to an unsatisfied lien such as a mortgage, or were subject to some encumbrance such as a public or private right of way. Unless specifically asked about what overriding powers the state might have over the lake or stream it is most unlikely that the attorney would say anything about them; and as it would occur to only a few prospective purchasers of riparian land to raise that question, most of them would have bought in ignorance of the possible existence of such powers.⁹¹⁸ Although as already indicated a court probably would hold that the state of the law prior to *Duryea* and *System* as to the existence of a state sovereign power over lakes and streams was so uncertain that no riparian owner could successfully attack as violative of due process a judicial decision declarative of that power on the ground that it unfairly surprised him, a legislature, when considering under what circumstances and to what extent to exercise that power might well give weight to the probability that many riparian owners, even though they had consulted counsel would, for the reasons stated above, be unaware when they bought their riparian land that the question of the existence and extent of that power was an open one, and that it might be resolved in a way contrary to their interests.⁹¹⁹

In some jurisdictions the state's navigation power is so broadly construed as to permit its exercise in furtherance not only of commerce but

of any other public purpose;^{919a} in effect so broadly as to include in the state navigation power the sovereign power which the New York courts have recognized as residing in the State of New York. It has been suggested that such a broad construction of the state navigation power is contrary to the public interest not only because it is unfair to riparian owners but also because it has a tendency to discourage private investment in riparian land.⁹²⁰ Since this suggestion clearly has appreciable force, it would seem to follow that a state power to curtail or abolish riparian privileges and rights in furtherance of any public purpose whatsoever should be exercised with great caution, even though it be viewed as a sovereign power of the state rather than as an incident of the state's navigation power.

Although as pointed out above the provisions of the Harmful Use Bill permitting substantially harmful alterations in and activities in connection with bodies of water when reasonable under all the circumstances, establishing the relevance to the issue of reasonableness of the public interest and of the actor's motive, and authorizing the use of water by a riparian owner on his non-riparian land when such use will not worsen the position of other riparians, could be held constitutional as an exercise of the state's sovereign or reserve power when sought to be enforced against owners of land riparian to bodies of water the beds of which are owned by the state,⁹²¹ such provisions could not be constitutionally validated as an exercise of that power if an attempt were made to enforce them against owners of land riparian to lakes and streams the beds of which are in private ownership, because the state's sovereign or reserve power to control and regulate the use of waters in the public interest does not extend to waters the beds of which are privately owned. Thus in *Chenango Bridge Co. v. Paige* the court, after finding that the bed of the Chenango River, though a navigable stream, was privately owned, said:

"The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh water streams than over other private property.

It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the Constitution."⁹²²

The same position was taken in *Fulton Light, Heat & Power Co. v. State of N.Y.* in which the court said with respect to the Oswego River, the bed of which is privately owned:

"The state, by the exercise of its power of eminent domain, could take these claimants' lands and divert from their power plant properties the water power which operated them, upon making just compensation therefor; but, in my opinion, it had no unlimited right to make a use of the river for a public purpose, except as such purpose was related to the improvement of the channel, or bed, of the river itself for purposes of navigation or transportation."⁹²³

And in *Duryea* the court, while affirming the existence of the state's sovereign or reserve power over waters the beds of which are owned by the state, said, as previously pointed out:⁹²⁴

"Other rules apply when the State is not the owner of the bed of the stream and when the stream is not composed of public waters in the sense that the Hudson and Niagara are public waters. In such a case the State may act to improve navigation in the natural channel without compensating the owners of the bed and bank, but even to improve navigation it cannot divert the channel without paying damages (*Fulton L., H. & P. Co. v. State of N.Y.*, 200 N.Y. 400). Where the bed (of a lake) is privately owned, water may not be diverted, except for navigation, even though the use may be for another public purpose, as a municipal water supply (*Smith et al. v. City of Rochester*, 92 N.Y. 463)."⁹²⁵

Of bases for a contrary position there appear to be few. One is perhaps afforded by the statement of the Court of Appeals in *System* that

its "ultimate holdings are not affected by and do not depend on navigability or non-navigability."⁹²⁶ Since in New York as in most states there are not many non-navigable bodies of water the beds of which are owned by the state,⁹²⁷ this statement could conceivably be construed as an affirmation that the state's sovereign or reserve power recognized in System extended over non-navigable lakes and streams and hence over bodies of water the beds of which are privately owned. However, for reasons already pointed out, it seems unlikely that the Court of Appeals intended to make any such affirmation.⁹²⁸

Actual authority for the position that the state's sovereign or reserve power encompasses waters the beds of which are privately owned, if the waters are navigable, is, however, supplied by *Bacorn v. State of N.Y.* in which the Court of Claims held that even if riparian owners on the Chemung River owned its bed, they were not entitled to compensation for the state's use of the bed in furtherance of a flood control project. After pointing out that the Chemung had been held to be navigable, the court cited System in support of the finding

"that what the state has done here is a proper exercise of public powers over public waters to which private interests are required to yield and for which no compensation must be made."⁹²⁹

and went on to say that

"The court does not deem it necessary to consider at length the question of title since whether claimants were simply riparian owners which they have at least established themselves or owned title under the bed of the river is immaterial. In either event the activities of the State in regard to Parcels 780 and 781 are a proper exercise of the State's power over public waters and the exercise of this power does not give rise to any right to compensation to these claimants."⁹³⁰

The extent to which *Bacorn* will be treated in the future as authoritative on the question under consideration is, however, doubtful. The Court of Claims, of course, cannot overrule the Court of Appeals; and the position

taken in Bacorn appears to be directly contra to the law as expounded by the Court of Appeals in Chenango and Fulton, and by the opinion in Duryea, part of which was expressly approved by the Appellate Division and the Court of Appeals in System, and the rest of which they apparently accepted without question.⁹³¹ It therefore seems safe to conclude, as suggested above, that enforcement of the provisions of the Harmful Use Bill against riparian owners on bodies of water the beds of which are privately owned, could not be defended as an exercise of the state's sovereign or reserve power, but only as an exercise of its police power.

Sec. 3. Text of the Harmful Use Bill.

Sec. 429-k. Harmful alterations in or harmful activities in connection with watercourses and lakes for the benefit of riparian land.

(1) An alteration in the natural flow, quantity, quality or condition of a body of water effected by a person owning land riparian thereto to further the use and enjoyment of such land by withdrawal, impoundment or obstruction of the water, or by the addition of water to a body of water, or by changes in the banks, bed, course or other physical characteristics of a body of water, or an activity in connection with a body of water carried on by such a person for such a purpose shall, as under the existing common law of this state, be lawful as against any person having an interest in such body of water, and shall not create a cause of action in any such person for damages or for an injunction, even though such alteration or activity is causing material or substantial harm to him or it or would cause him or it material or substantial harm immediately if and when begun, if such alteration or activity is reasonable under all the circumstances or would be reasonable under all the circumstances if and when begun, unless such alteration or activity is or would be in violation of an interest in the body of water created by the grant or agreement of the person effecting such alteration or carrying on such activity, or in violation of an interest created by prescription against such person.

(2) As under the existing common law of this state, a harmful alteration in the natural flow, quantity, quality or condition of a body of water, though effected or intended by a riparian owner to further the use or development of his riparian land, or a harmful activity in connection with a body of water, though carried on or intended by a riparian owner for the same purpose, shall, if unreasonable under all the circumstances, be unlawful. A person harmed by such an alteration or activity, and having an interest in the affected body of water, may maintain an action for damages and, if the circumstances are appropriate, an action for injunctive relief; and a person having such an interest and who would be immediately harmed by such an alteration or activity if and when begun may, if the circumstances are appropriate, maintain an action for injunctive relief. The provisions of subdivision seven of section four hundred twenty-nine-j of the conservation law with respect to the running of the

statute of limitations shall be applicable to such actions.

(3) This section shall apply to the alterations or activities referred to therein regardless of whether they were begun before or after its effective date.

Sec. 429-1. Harmful alterations in or harmful activities in connection with watercourses and lakes effected or carried on by riparian owners for the benefit of their non-riparian land.

(1) If a person owning land riparian to a body of water has the privilege of effecting a certain harmful alteration in it or of carrying on a certain harmful activity in connection with it under section four hundred twenty-nine-k of the conservation law to further the use and enjoyment of his riparian land, such person, in lieu of the exercise of such privilege, may effect such alteration or carry on such activity to further the use of non-riparian land owned by him or it without giving rise to a cause of action against him or it for damages or for an injunction in persons having an interest in the body of water affected, provided the substitution of such non-riparian land for such riparian land as the beneficiary of such privilege does not cause greater harm to the persons having an interest in such body of water, or require a greater alteration in or activity in connection with such body of water than would have been caused or required if such substitution had not been made.

(2) Any attempted or intended exercise by a person owning riparian land of the alteration or activity privilege which he or it had under subdivision one of section four hundred twenty-nine-k of the conservation law in furtherance of the use or development of his or its non-riparian land, rather than in furtherance of the use and development of his or its riparian land, shall be unlawful if it did not when begun or would not if begun fulfill the conditions prescribed in subdivision one of this section. A person harmed by such alteration or activity and having an interest in the affected body of water, may maintain an action for damages and, if the circumstances are appropriate, an action for injunctive relief; and a person having such an interest and who would be immediately harmed by such an alteration or activity if and when begun may, if the circumstances

are appropriate, maintain an action for injunctive relief. The provisions of subdivision seven of section four hundred twenty-nine-j of the conservation law with respect to the running of the statute of limitations shall be applicable to such actions.

(3) This section shall apply to the alterations or activities referred to therein regardless of whether they were begun before or after its effective date.

Sec. 429-m. Determination of reasonableness of harmful alterations in or of harmful activities in connection with watercourses and lakes.

(1) The question as to whether an alteration effected or intended by a person in a body of water or an activity carried on or intended by a person in connection with a body of water to further the enjoyment of land riparian to the body of water and owned by him or it is or would be reasonable, though causing material or substantial harm or threatening material or substantial harm immediately to another person having an interest in the body of water affected, is one of fact the answer to which is dependent upon the circumstances of the particular case and may vary when such circumstances vary. When deciding this question, the trier of the fact shall take into account as many of the following circumstances as have relevance to the particular case and any other relevant circumstances which may appear. Except as hereinafter provided, the weight to be given to any single circumstance shall depend on its relation to all the relevant circumstances.

(a) The relative importance to the public of the primary purpose to be served by the alterations effected or intended in the body of water or by the activities carried on or intended in connection with the body of water by the contesting persons.

(b) The relative suitability of such alterations or activities to the region of the state in which the body of water is situated, and to the body of water in view of its physical characteristics. When determining such suitability account shall be taken of the alterations customarily effected in and of the activities customarily carried on in connection with similar bodies of water in the state.

(c) The amount of harm which would be caused to each of the contesting persons, whether plaintiff or defendant, by the recognition or denial of the privileges of alteration or activity respectively claimed by them; but a finding that the plaintiff would sustain greater harm if the defendant's alteration or activity were held reasonable than the defendant would sustain if his alteration or activity were held unreasonable shall not necessarily lead to the conclusion that the defendant's alteration or activity is unreasonable, nor shall a finding that the defendant would sustain greater harm if his alteration or activity were held unreasonable than the plaintiff would sustain if the defendant's alteration or activity were held reasonable necessarily lead to the conclusion that the defendant's activity is reasonable.

(d) The relative availability to the contesting persons of practicable means of minimizing or avoiding the harm resulting from an alteration or activity or which would result from it if begun. When determining the practicability for a person of any such means, evidence as to the cost of resort thereto and as to the ability of the person's business or enterprise to meet such cost shall be relevant.

(e) The location on the body of water of the points of access thereto of the contesting persons.

(f) The relative priority in time of the commencement of the alterations or activities of the several contesting persons; but a finding that one person had priority in time over another in this respect shall not necessarily lead to the conclusion that the alteration effected or the activity carried on by the person establishing such priority is reasonable and entitled to preference.

(g) The motive of a person effecting or intending an alteration or carrying on or intending an activity; but an alteration or activity which would have been found reasonable if not maliciously motivated shall not be found unreasonable because of malicious motivation unless it clearly appears that its primary purpose was or is malicious.

(2) No alteration or activity referred to in subdivision one of this section shall be held unreasonable as against another person as a matter of law merely because such alteration or activity is or would immediately be materially or substantially harmful to another person, or merely

because such alteration or activity involves or would involve the withdrawal, diversion, change in quality or seasonal impoundment of the water; or the addition to the body of water obtained from another source; or any other particular sort of alteration or activity.

(3) In litigation involving the reasonableness of an alteration or activity referred to in subdivision one of this section, the reasonableness of all such alterations or activities effected or carried on by all the parties to such litigation shall be determined and taken into account.

(4) This section shall apply to any alteration or activity referred to in subdivision one of section four hundred twenty-nine-k of the conservation law regardless of whether or not it was begun before the effective date of this section.

Sec. 429-n. Liability for harm caused by negligent conduct. Nothing in this part III-B of this chapter shall be construed as exempting any person from liability in accordance with the common law of this state for harm caused by an alteration effected in the natural condition of a body of water or by an activity carried on in connection with a body of water by him or it in a negligent manner.

Sec. 429-o. Exceptive provisions. Nothing contained in the provisions of sections four hundred twenty-nine-j, four hundred twenty-nine-k, four hundred twenty-nine-l, four hundred twenty-nine-m or four hundred twenty-nine-n of this chapter shall be construed as increasing the number of instances in which it is now lawful for a person to enter personally or by agent on riparian land owned by another person; or to enter in such manner on the surface or beneath the surface or on or beneath the bed of a body of water, the bed of which body is owned by another person; or to cause the dry land of another to be so covered or permeated with water that harm to its owner results. Nor shall said sections be construed as altering the existing common law of the state of New York with respect to the rights and privileges of persons making or intending to make domestic uses of bodies of water. And nothing contained in said sections shall be construed as altering or affecting the right to exercise any power which the state of New York or any agency thereof, or any county, city, town or village, or any agency thereof, may have to enjoin the initiation or continuance of an alteration in the natural condition of a body of water; or as increasing or decreasing the rights, privileges and powers of any of said bodies in and with respect to bodies of water.

CHAPTER 8

OTHER NEEDED IMPROVEMENTS IN NEW YORK WATER LAW

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| Sec. 1. <u>Relaxation of Common Law Restrictions on Harmful Non-Riparian Use of Lake and Stream Water by Non-Riparians.</u> | |

As already pointed out, under existing New York common law harmful use of lake or stream water for the benefit of non-riparian land is apparently unlawful, even though the harm inflicted would have been reasonable and lawful if inflicted in the course of a use for the benefit of riparian land.⁹³² If proposed sec. 429-1(e11) of the Harmful Use Bill is enacted as recommended,⁹³³ it will become lawful in New York for a riparian owner to substitute non-riparian land owned by him for his riparian land as the beneficiary of his riparian privileges and rights, provided such substitution does not cause greater harm to the other persons having interests in the lake or stream, or require a greater alteration in or activity in connection with the lake or stream than would have been caused or required if such substitution had not been made.⁹³⁴

It is submitted that the same considerations which support the recommendation of sec. 429-1(e11),⁹³⁵ and other considerations which will be referred to shortly, justify the further recommendation that the common law restrictions now in force in New York on the harmful use by non-riparians of lake and stream water for the benefit of non-riparian land be relaxed by the enactment of a statute legalizing such use (subject to the conditions set forth below), and protecting such non-riparian use as becomes lawful under the statute against unreasonable interference⁹³⁶

(1) When a riparian owner, although conveying his riparian land, reserves to himself the riparian privileges and rights incident thereto, and wishes to exercise such privileges and to enforce such rights for the benefit of his non-riparian land;

(2) When a riparian owner, although retaining his riparian land transfers to another the riparian privileges and rights incident thereto, and the transferee wishes to exercise such privileges and to enforce such rights for the benefit of his non-riparian land; and

(3) When a riparian owner conveys a part of his riparian tract to another, which part is so located that it becomes non-riparian land after conveyance because of loss of contact with the water,⁹³⁷ and also transfers expressly or impliedly to the grantee the riparian privileges and rights incident to the part of the riparian tract conveyed, and the grantee-transferee wishes to exercise such privileges and enforce such rights for the benefit of the land conveyed to him provided the party asserting the reserved or transferred privileges and rights owns land, or an easement over the land of another, which would enable him to have access to the lake or stream without committing a trespass; and provided further that the privileges and rights retained by the reserver or received by the transferee for the benefit of non-riparian land be limited in extent to what is reasonable under all the circumstances.⁹³⁸

As the extent of those interests was, of course, subject to such a limitation prior to their severance from the riparian land to which they

were originally incident, legislation which did not provide that the riparian privileges and rights of the reservor or transferee are to be so measured would be unacceptable as in conflict with either one of two salutary rules of conveyancing: viz., that a grantor cannot reserve or convey a greater interest than he has,⁹³⁹ and that a grantor will not be held to have reserved or conveyed a smaller interest than he has unless the deed provides to the contrary.⁹⁴⁰

It should be noted, of course, that acceptance of the above recommendations with respect to the extent of the privileges and rights of a reservor or transferee of severed riparian interests would in some instances, because of the riparian doctrine of variability,⁹⁴¹ enable the reservor or transferee to do acts and to enforce restrictions on the activities of others which the original owner of those interests would have not been able to do or to enforce. If, for example, the use which the transferee of severed riparian privileges planned to make of the water, was more suitable to the lake or stream involved and more consistent with the public interest than the use which his transferor had been making, a court might well hold that by virtue of the doctrine of variability the riparian interests which the transferee had obtained, though still measured by the doctrine of reasonableness, included more numerous and/or greater privileges and rights because they were being asserted under different conditions than those which prevailed when the riparian interests were owned by the severing party. While there appears to be no judicial authority explicitly to this effect, there is language in several cases which could conceivably be construed as supporting it, and could readily be interpreted as consistent with it.⁹⁴²

If it be argued that the imposition of the conditions recommended above would not afford sufficient protection to riparian owners not parties to the severance, and that the reservor or transferee should, therefore, be subject to restrictions similar to those to which sec. 429-1(e11) of the Harmful Use Bill would, if enacted, impose on a riparian owner electing to exercise his riparian privileges and to enforce his riparian rights for the benefit of his non-riparian land instead of for the advantage of his riparian land: viz., that the exercise of the privilege and the enforcement

of the rights for the benefit of his non-riparian land shall not cause greater harm to riparian owners not parties to the severance, and shall not require a greater alteration in or activity in connection with the lake or stream than would have been caused or required if the reservor or transferor of the riparian interests had himself lawfully exercised them for the benefit of the riparian land to which they were originally incident while still attached thereto,⁹⁴³ several considerations can be urged in reply.

First it can be pointed out that although it might be practicable to administer such rules in a case in which a riparian owner had substituted his non-riparian land for his riparian land as the beneficiary of his riparian interests, the administration of such rules might often be much more difficult if the owner of the privilege and rights and the owner of the riparian land to which they had once been incident are not the same person. In the situation to which proposed sec. 429-1(e11) would apply, it would not be particularly difficult, even at some distant time in the future, to determine the extent of the riparian owner's privileges and rights with respect to his non-riparian use because it would have the same extent as those interests would have if he were enjoying them in connection with his riparian land. In other words, the yardstick for measuring the permissible extent of the substituted use is conveniently close to the place of enjoyment of the interests to be measured. In the situation now under consideration, however, the distance between the yardstick, if it is to be the extent of the riparian owner's enjoyment of his riparian land prior to the severance, would often be much greater, both because the non-riparian land to be benefitted by the exercise of the privileges and the enforcement of the rights might be far distant from the riparian land to which those interests were originally incident, and because the interests of one person are being measured by the interests of another individual instead of having the interests of one person with respect to one piece of land measured by his own interests with respect to another piece.⁹⁴⁴

In the second place it can be contended that the restriction of the reservor or the transferee of severed riparian rights and privileges to an enjoyment thereof which would be no more harmful to riparians not parties

to the severance than the uses of the water which were being made prior to the severance, and which would require no greater alteration in or activity in connection with the lake or stream than would have been involved if the reserver or transferor of the privileges and rights had himself lawfully exercised them while they were still attached to the riparian land to which they were originally incident, would in many instances prevent the reserver or transferee from making as much use of the water as he could have if were restricted only by the doctrine of reasonableness, and so would thwart to an undesirable extent the principal purpose of legislation legalizing use of lakes and streams for the benefit of non-riparian land: viz., to make water available for such use when it would be advantageous to the non-riparian and to the public.⁹⁴⁵

Thirdly it could be objected that since the imposition of such drastic restrictions would confine the reserver or the transferee of severed riparian privileges and rights to the activities in which the severor could lawfully have engaged prior to the severance, such restrictions would interfere to an unacceptable extent with the variability principle of the riparian doctrine by virtue of which activity that would have been unreasonable at one time and under certain conditions at a later time and under other circumstances; thereby avoiding undue rigidity in the pattern of water use.

In the fourth place, if riparians not parties to the severance should assert that if activities by the reserver or transferee of the riparian privileges and rights for the benefit of non-riparian land are to be limited only by the doctrine of reasonableness, their justifiable expectations as riparian owners that their riparian interests would never be cut down to facilitate activities for the benefit of non-riparian land would be unfairly disappointed, it can be replied that when a person buys riparian land in New York he, or at least his attorney, should know that his interest would always be subject to the hazard of possible diminution in favor of other riparians pursuant to the variability principle, and should moreover have anticipated the possibility that the public interest might ultimately require relaxation of the riparian doctrine rules discriminating against

uses and activities for the benefit of non-riparian land. And finally it is worthy of note that most of the legislation relaxing these rules which has been enacted in the eastern states does not impose restrictions on non-riparian use of the sort under consideration at this point.⁹⁴⁶

In view of the importance which is currently attached to the reasonable expectations of private property owners and to the foreseeability of a change in the law when passing upon the ability of a statute effecting the change to qualify as a valid exercise of the police power,⁹⁴⁷ the constitutionality of the legislation recommended above may well turn on the court's acceptance or rejection of the considerations just referred to. Scholarly opinion is divided on the point.⁹⁴⁸

That a riparian owner who has included a reservation of his riparian privileges and rights in the deed by which he conveys his riparian land to another should be able to exercise them for the benefit of his non-riparian land seems clear. One who acquires riparian land by such a deed has no just claim to riparian privileges and rights,⁹⁴⁹ because he assented to their reservation by his grantor, and presumably paid him a smaller amount than he would have had he been expecting to acquire them.⁹⁵⁰ If the reserving grantor is not allowed to enjoy them for the benefit of his non-riparian land, he will sustain a loss, for he will have neither them nor the additional money which the grantee of the land would have paid him if they had passed to him along with it; and the other riparian owners of the lake or stream will be able to make more extensive use of it than it would have been lawful for them to make if the grantor had not attempted to reserve his riparian privileges and rights to himself,⁹⁵¹ and without being obligated to pay anyone anything for this increased privilege.

And finally it would seem that the public interest in having water resources put to their optimum use would be served by permitting the grantor to use the reserved privileges and rights for the benefit of his non-riparian land. Since the grantee of the riparian land did not pay the higher price which their transfer to him along with the land would have called for; since the grantor of the riparian land accepted a lower

price for it than he might have obtained if he had not reserved the riparian privileges and rights; and since the other riparian owners have not bought any part of them, it seems safe to assume that in most instances their use by the grantor would be more productive and hence more in the public interest than any use which the grantee or the other riparian owners might make.⁹⁵²

It would also seem clear that when a riparian owner, although retaining his riparian land, purports to transfer his riparian privileges and rights to a non-riparian, the latter should be allowed to exercise them for the benefit of his non-riparian land to the same extent that his transferor could have exercised them for the benefit of his riparian land if he had retained them. Since the transferee normally would have paid a price for them he will in most cases sustain a substantial financial loss if he is not allowed to do so unless his transferor voluntarily refunds the price - an act which he may be unwilling to perform; or unless the transferee is successful in a suit against the transferor to recover the price: a suit that might involve legal questions of considerable difficulty⁹⁵³ which he would have no reason for litigating if the recommended legislation were enacted. Even if the non-riparian transferee of riparian privileges and rights had paid nothing for them, his inability to exercise them might cause him loss because of expenditures he had made on the assumption that they would be valid in his hands.

A riparian transferor of riparian privileges and rights, having clearly shown an intent to part with them, has, of course, no just foundation for a claim that they are still his; and this would be particularly true if he had received a price for them as would usually be the case.⁹⁵⁴ Moreover, if neither the transferor nor the transferee of the riparian privileges and rights can exercise them, the other riparian owners on the lake or stream will be able to derive more benefit from the water than it would have been lawful for them to have if the transfer had not been attempted, and without having paid anything for the additional benefit. In other words, the other riparian

owners would get a windfall as undeserved as the one that would accrue to them if a grantor of riparian land who had reserved his riparian privileges and rights from the grant were not allowed to exercise them.⁹⁵⁵

And finally, it would seem that the public interest in having water resources put to their optimum use would be served by permitting a non-riparian transferee of riparian privileges and rights to exercise them, just as it would be served by permitting a non-riparian reserver of such privileges and rights to do so. Since the transferor was willing to part with them; since the transferee in most cases shows his desire for them by paying a price, and merely by accepting them in the unusual case when they come as a gift, it seems reasonable to conclude that their use by the transferee will ordinarily be more productive and therefore more in the public interest than any which the transferor or the other riparian owners would be likely to make.⁹⁵⁶

It would also seem clear that if A, the owner of a riparian tract, grants a part of it to B, which part thereupon becomes non-riparian because it has no contact with the water after the grant,⁹⁵⁷ and purports either expressly or impliedly to transfer along with the granted land the riparian privileges and rights incident thereto, B should be able to enjoy for the benefit of the land granted to him, although it is now non-riparian, the riparian privileges and rights which were incident to the granted land when it was still owned by A. As B would usually have paid A more for the grant of the land accompanied by a transfer of the riparian privileges and rights than he would have paid for a grant of the land alone, B would normally suffer financial loss if he is not permitted to enjoy the privileges and rights unless A voluntarily refunds the part of the price allocable to them, which he might refuse to do, or unless B can recover that part of the price in an action against A: an action which, as already pointed out, might involve knotty legal questions.⁹⁵⁸ Moreover, B might suffer loss if he is not allowed to enjoy them even if he paid nothing for them, because he may have spent money in preparation for their enjoyment in the belief that their transfer to him would be held valid.

For the reasons stated when discussing the effect of a purported transfer of riparian privileges and rights unaccompanied by a grant of any land whatsoever,⁹⁵⁹ neither A nor the other riparians can present a claim to the riparian privileges and rights which is as meritorious as B's or show that they themselves would be prejudiced by his enjoyment of them to the extent indicated; and B's ability to enjoy to that extent the riparian privileges and rights attempted to be transferred to him for the benefit of his non-riparian land would in most instances further the public interest in optimum use of water resources.

Although there appears to be no New York judicial decision rejecting B's claim in the situation supposed, it would seem advisable for New York to enact a statute which would expressly legalize such enjoyment by B.⁹⁶⁰ Most of the authority for the position that such enjoyment would be legal at common law consists of California cases which are based at least in part on the theory that the portion of A's riparian land conveyed by him to B continues to be riparian despite its lack of contact with the water.⁹⁶¹ Whether or not the New York courts would be willing to approve such an exception to the widely prevalent common law rule that land cannot be riparian unless it borders on the water⁹⁶² is, of course, a speculative matter. The other basis on which the California cases appear to rest is that A's purported transfer of riparian privileges and rights to B⁹⁶³ is valid against third parties by virtue of an exception made in such cases to the general rule prevailing in California and some other states that transfers by a riparian owner of his riparian privileges and rights to one who owns no riparian land, while good as against the transferor, are not valid as against third parties.⁹⁶⁴ But as there appears to be no New York judicial opinion which has rejected the general rule or has considered whether or not any exceptions to it should be recognized,⁹⁶⁵ it cannot be safely assumed that the New York courts would be willing to accept the California case as sound on this basis. Moreover, it was recently held in *Thompson v. Enz* that the California cases affording support for the legality of B's use should not be followed in Michigan, a riparian doctrine state, because water is more scarce in California, than in Michigan, because California is a dual system state recognizing

appropriative as well as riparian water rights, and because many of the water law rules in force in California "differ immensely" from those prevailing in Michigan.⁹⁶⁶ Since despite the truth of the court's statements in Thompson as to the difference between the California and Michigan situations, it would seem as desirable in Michigan as in California to permit enjoyment of riparian privileges and rights for the benefit of non-riparian land when such enjoyment furthers the public interest in the optimum use of water resources,⁹⁶⁷ the reasons given in Thompson for rejection of the California cases upholding B's claim seem far from conclusive. It is nevertheless entirely conceivable that the New York courts might look upon Thompson as an important precedent supplied by the highest court of an eastern riparian doctrine state and arriving at a result which they preferred over the one reached in the California cases; not because adequate reasons for rejecting those cases were given in Thompson, but because, as already suggested, the New York courts might deem it inadvisable to recognize an exception in this instance to the generally prevalent rule that land without contact with the water cannot qualify as riparian, or an exception to the rule established in California and in several other states that a non-riparian transferee of riparian privileges and rights cannot enjoy them for the benefit of his non-riparian land, because the transfer of such interests to a non-riparian is not good as against third parties: a rule which the New York courts could, if they wished, treat as a part of New York common law, since up to now they have neither expressly adopted nor rejected it.

Sec. 2. Elimination of Uncertainty as to the Legality of Harmful Enjoyment of Riparian Privileges and Rights for the Benefit of Riparian Land Other Than that to which They Were Originally Incident.

Although the courts have seldom had occasion to pass upon the legality of the harmful enjoyment of the riparian privileges and rights incident to riparian tract X by A, the owner of the tract, for the benefit of riparian tract Y also owned by him, *Holmes v. Nay*, as previously pointed out, takes the position that it would be unlawful for him to do so.⁹⁶⁸ It seems clear, nevertheless, that the law should be to the contrary in any case in which A's use for the benefit of tract Y of the water to which he would

be entitled as the owner of tract X would be reasonable under all the circumstances.

The reasons for this conclusion are substantially the same as those already offered in support of sec. 429-1(e11) of the Harmful Use Bill which, if enacted, would authorize A to use the water to which he was entitled by the ownership of tract X for the benefit of non-riparian land owned by him.⁹⁶⁹ In the situation now under consideration, as in that dealt with in sec. 429-1(e11), the privilege of shifting the place of use would be valuable to the riparian owner whenever, as could easily be the case, it would be more profitable for him to use some or all of the water to which he was entitled by virtue of his ownership of tract X for the benefit of tract Y than it would be for him to use for the benefit of tract Y only the water to which he was entitled by virtue of his ownership of that tract. His possession of such a privilege would also further the public interest in the optimum use of water.⁹⁷⁰

Moreover, unless it is lawful for A to substitute riparian tract Y for riparian tract X as the beneficiary of the water privileges and rights incident to tract X, it would be difficult for a court to hold that A, when conveying tract X to B, could reserve for himself the riparian privileges and rights incident thereto and exercise and enforce them for the benefit of tract Y. It would likewise be difficult for a court to hold that A could, while retaining tract X, transfer to B the riparian privileges and rights incident thereto and that B could exercise and enforce them for the benefit of riparian tract Z owned by him; for it can be argued with some force that if A does not have the privilege of exercising and enforcing riparian privileges and rights incident to tract X for the benefit of another riparian tract, he cannot transfer such a privilege to B because of the basic principle of property law that a man cannot convey what he does not have.⁹⁷¹ Thus in *Duckworth v. Watsonville Water & Light Co.*⁹⁷² in which it appeared that Grimmer, the owner of land riparian to the outlet of a lake, transferred to Duckworth, a riparian owners on the lake, all riparian rights incident to Grimmer's riparian tract, and that Duckworth, claimed that by virtue of this transfer he had acquired the privilege as against the defendant, a

riparian owner on the lake, of taking water from the lake for use on his riparian land,⁹⁷³ the Supreme Court of California rejected the lower court's approval of Duckworth's claim in this respect and said:

"Grimmer had a right to use a reasonable portion of the water running in the outlet by his land for the irrigation of his land riparian thereto, and to take the whole of it, if necessary, for domestic purposes...his riparian right is limited to his riparian land. It gave no right to use any of the water of the stream for any purpose upon land not riparian nor upon any riparian land other than his own. No one can sell or convey to another that which he does not himself own. Grimmer could not by a transfer of his riparian rights sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or non-riparian, except his own, to which it was originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties...It follows, therefore, that Duckworth did not obtain anything by the Grimmer deed except the right to use the water of the outlet on the Grimmer land...and an estoppel against Grimmer to prevent complaint by him against any use of such water which Duckworth might make to the injury of the Grimmer riparian right...It did not in any respect add to his rights to take water from the lake for use on the Duckworth land, as against the defendants, or as against any one except Grimmer and his successors in interest."⁹⁷⁴

It should be noted that the court did not say in support of this conclusion that to uphold Duckworth's claim would have been prejudicial to the defendant because even if Duckworth were allowed to withdraw only as much water from the lake for use on his riparian tract as defendant would have been legally obligated to allow to flow into the outlet to satisfy Grimmer's riparian right if he had not transferred his riparian interest to Duckworth, the amount of water available to the defendant prior to Grimmer's transfer would have been decreased, but apparently took the broad position that a transfer to another riparian owner of riparian privileges and rights apart from the

riparian tract to which they are incident, while valid as against the transferor, is invalid as against third parties if they are harmed by the transferee's enjoyment of the privileges and rights, even though the harm they suffer from such enjoyment is no greater than that which the law would have required them to endure if no transfer had occurred.⁹⁷⁵

This should not be the law. Regardless of the objections of third parties, owners of riparian privileges and rights should be allowed to make whatever disposition thereof as is most advantageous to them, and so to serve the public interest in the optimum use of water, if that disposition is reasonable under all the circumstances. Subject to that condition, the buyers of riparian interests severed from riparian land should have something to show for their purchase money; the legal authority to exercise the purchased privileges and enforce the purchased rights for the benefit of non-riparian land or of riparian land other than that to which they were originally incident. Grantors of riparian land who have reserved for themselves the riparian privileges and rights when conveying riparian land should also be permitted to enjoy them with equal freedom in view of the lower purchase price they would normally receive when conveying the riparian land shorn of such interests. Otherwise serious injustice may be inflicted on such transferees and grantors as already pointed out.⁹⁷⁶

Is the existing New York common law in accord with the objectionable rule laid down in *Holmes and Duckworth*? If it is not, legislation authorizing the enjoyment of riparian privileges and rights for the benefit of riparian land other than that to which they were originally incident might not be necessary. Relevant to this inquiry is *United Paper Board Co. v. Iroquois Pulp & Paper Co.*⁹⁷⁷ in which it was held that when a riparian tract to which a riparian power privilege is incident is divided, one part being conveyed and one part retained, there can be severed from the part retained a fraction of the power privilege which would have continued to be incident to it after the division if a provision to the contrary had not been included in the dividing deed; and that the fraction of the power privilege so severed from the retained part of the riparian tract can be transferred along with the conveyed

part of the tract with the result that the grantee thereof receives a larger fraction of the power privilege than he would have been entitled to if his claim were founded solely on his status as grantee of part of the riparian tract. In brief, United Paper Board holds that a riparian power privilege can be severed from the riparian land to which it is incident and transferred to another person along with other land riparian to the stream. Although the court did not in its opinion in this case discuss or even refer to the general question as to whether it would be lawful to exercise and enforce riparian privileges and rights originally incident to riparian tract X for the benefit of riparian tract Y, its holding necessarily implied an affirmative answer to this question; for in the absence of such an implication the transferee would have received interests which were privileges and rights only in form but not in substance.

But even if this assumption as to what the court impliedly held in United Paper Board is correct, it could be argued that such a holding would not prevent a New York court from following Holmes and Duckworth when confronted with a case in which third persons objected to the exercise and enforcement of riparian privileges and rights for the benefit of riparian land other than that to which they were originally incident, because no persons other than those participating in the severance of riparian interests from riparian land attempted in United Paper Board were parties to that action. In other words, it could be argued that the decision in United Paper Board was reconcilable with Holmes and Duckworth because it went no farther than to hold in accord with the admission in those cases that an agreement by A that B can exercise riparian privileges and rights incident to riparian tract X owned by A for the benefit of riparian tract Y owned by B is valid as between A and B.

It should be noted, however, that by way of rebuttal it could be pointed out that the court in United Paper Board defined the extent of the riparian interest of the transferors in the following terms:

"They had a mere usufructuary right..., subject to the right of the state and rights equal with theirs in the owners of the opposite or western bank. Their usufructuary and proprietary right was...to draw from the dammed waters water, for the purpose of power, in such quantity at any time as would not conflict with the right of the state or other riparian owners... Such right as an entirety or any part of it they could grant. The right measured their interest in and title to the water power in those waters and the extent of any grant and all grants of power by them."⁹⁷⁸

and that it could be argued that these statements warrant the inference that the court would, if squarely confronted with the question, hold that exercise and enforcement of riparian privileges and rights for the benefit of riparian land other than that to which they were originally incident would be lawful as against third parties, because the court had so defined the extent of such privileges and rights, regardless of who might claim them, as to prevent the substitution of riparian tract Y for riparian tract X as the beneficiary of such privileges and rights from subjecting third parties, such as other riparians, to violation of their interests in the lake or stream.

It must be conceded, however, that there are several bases for a contrary prediction. Among these is the failure of the court to include in its opinion in *United Paper Board* an express dictum that because the extent of riparian privileges and rights, regardless of who holds them at the moment, is always limited by the privileges and rights of other riparians, the substitution in that case of one riparian tract for another as the beneficiary of the power privilege would have been valid, even if subjected to attack by other riparians. Still another basis for a contrary prediction is afforded by the apparent lack of precedent precisely in point for a holding in B's favor in the situation under consideration. While decisions that a riparian privilege or right may be severed from the riparian land to which it was originally incident and transferred to the owner of the other riparian land, which decisions include by implication a holding that enjoyment of the transferred interest for the benefit of the transferee's riparian land would be lawful, are

not uncommon,⁹⁷⁹ there seems to be no case in which the court has reached such a conclusion in the face of objection by other riparians to the severance and transfer.⁹⁸⁰ It is true that decisions can be found which, it could be argued, are basically inconsistent with the position taken in *Holmes and Duckworth* in regard to the effect of objection by third parties to the legality of the substitution of one riparian tract for another as the beneficiary of riparian privileges and rights. See, for example, *Smith v. Stanolind Oil & Gas Co.*⁹⁸¹ in which it was held that the extent of a water privilege in the hands of a non-riparian to whom a riparian owner had transferred it is measured by the extent it had when owned by the transferor, and that the transferee can lawfully exercise the privilege despite the objection of another riparian owner who is harmed by such exercise. See also *Lawrie v. Silsby*⁹⁸² in which the court took the position that non-riparians to whom a riparian owner had transferred the privilege of taking water from a brook for use on their non-riparian land had acquired a right against another riparian owner that their reasonable exercise of the privilege should not be unreasonably interfered with by him. The fact remains, however, that a court which wished to follow *Holmes and Duckworth* could find at least a technical basis for deciding that *Smith* and *Lawrie* were distinguishable from rather than contrary to those cases because *Smith* and *Lawrie* involved transfers and enjoyment of riparian privileges and rights to and by non-riparians, whereas *Holmes and Duckworth* were concerned with transfers and enjoyment of riparian privileges and rights to and by owners of riparian land other than that to which the riparian interests were originally incident. And still another basis for a prediction that a New York court would predicate a rejection of B's claim on the authority of *Holmes and Duckworth* is supplied by the apparent absence of any judicial opinion rendered by a New York court or by the court of any other state in which the *Holmes-Duckworth* doctrine is referred to and expressly rejected.

In view of this state of the authorities, and of the consequent uncertainty as to which the New York courts would elect to follow, it would seem advisable for the New York legislature to enact a statute

which would prevent the New York courts from adopting the Holmes-Duckworth doctrine by expressly authorizing, in each of the following instances, the exercise of riparian privileges for the benefit of riparian land other than that to which they were originally incident, and the enforcement for the protection of such privileges of ancillary riparian rights that their exercise should not be unreasonably interfered with:⁹⁸³

1. When A is the owner of riparian tracts X and Y;
2. When A, the owner of riparian tracts X and Y, reserves the riparian privileges and rights incident to tract X when conveying it to B;
3. When A, the owner of riparian tract X, transfers the riparian privileges and rights incident thereto to B. the owner of riparian tract Y.

provided that the substitution of one riparian tract for another as the beneficiary of the riparian privileges and rights can be effected without causing greater harm to third parties and without involving a greater alteration in or a greater activity in connection with the lake or stream in question than would have been caused or involved by the exercise or enforcement of riparian privileges and rights if the substitution had not been effected.⁹⁸⁴

Sec. 3. Clarification of Uncertainties as to the Severability by Reservation or Transfer of Riparian Privileges and Rights from the Riparian Land to which They Were Originally Incident.

In sec. 1 of this chapter it was recommended that the New York legislature enact a statute legalizing the exercise and enforcement of riparian privileges and rights for the benefit of non-riparian land to a reasonable extent in view of all the circumstances.⁹⁸⁵ Sec. 2 of this chapter contained the further recommendation that legislation be adopted in New York authorizing the exercise and enforcement in certain instances of riparian privileges and rights for the benefit of riparian land other than that to which they were originally incident, subject, however, to the condition above stated.⁹⁸⁶ If the legislation recommended is, when enacted, to have practical significance in the instances in which

severance of riparian privileges and rights⁹⁸⁷ from the land to which they were originally incident is involved, it must, of course, be clear that a riparian owner in New York has the legal power to sever his riparian privileges and rights from his riparian land by reservation or transfer. Inasmuch as the recommended legislation does not expressly declare that riparian owners have such a power, the question arises as to whether this lack should be supplied by an additional statute.

Although it can, of course, be argued that an additional statute is not required, since the legislation proposed in sec. 1 and 2 would, if adopted, create such a power by unavoidable implication, because, though it does not expressly declare its existence, it so plainly assumes the severability of riparian privileges and rights by reservation or by transfer, it would nevertheless seem desirable for New York to enact legislation clearly indicating to what extent and with what effect riparian privileges and rights are severable from riparian land by these means. For this precaution, which might at first glance seem excessive, there are good reasons. The New York authority as to the severability of riparian privileges and rights as to the effect of such severance, if achievable, is so sparse that the New York courts, when confronted with a severability case in the future, would almost surely inquire into the law as to severability prevailing elsewhere. If they did, they would discover a division of authority as to the effectiveness as against third parties of severances of riparian privileges and rights from riparian land; and although there seems to be no New York judicial authority for the proposition that a severance of such privileges and rights is ineffective against third parties, and although, because of the wording of the proposed legislation, it is probable that the New York courts would construe it, if enacted, as impliedly providing for such effectiveness, it is at least conceivable that they might not in view of the considerable authority in other states taking the position that a riparian owner cannot transfer a privilege to make a harmful non-riparian use, or a right that the exercise of such a privilege shall not be interfered with, or a privilege to make a harmful use for the benefit of riparian land other than that to which the privilege was originally incident, or a right that the exercise of such a privilege shall not be

unreasonably interfered with, since he himself has no such privilege and rights; and that therefore severances of riparian privileges and rights, by reservation or transfer, from the riparian land to which they were originally incident are not effective as against third parties at common law.⁹⁸⁸

An important part of what little New York common law exists in this area can be gleaned from the opinion of the Court of Appeals in *United Paper Board Co. v. Iroquois Pulp & Paper Co.*,⁹⁸⁹ which case has become the leading one in New York in the field of transferability of riparian interests because of the respect paid it by the federal as well as by the New York courts. In this case it appeared that Thomson and Dix owned a tract of land riparian to the Hudson River above and below the point where the State of New York had erected and was maintaining a dam in aid of the Champlain Canal; that in 1888 they conveyed to the predecessors of the plaintiff a part of the riparian tract lying south of and downstream from the unconveyed part of the tract together with

"the right to take have and use and enjoy...one half of all the water flowing in the Hudson River at that point saving excepting and reserving therefrom...so much of said waters and the right to draw and use the same whenever the same shall not be required by the said party of the second part...for actual use in propelling machinery or for manufacturing purposes on the lands hereby conveyed and at all times when the water of said river shall be actually flowing over the crest of the dam as shall be necessary or required to propel the machinery of and supply power for operating the sawmills... now owned by said Thomson and Dix."⁹⁹⁰

that the sawmills were on the part of the tract retained by Thomson and Dix north of and upstream from the part conveyed; that in 1902 they conveyed this north part of the tract to defendant together with the water rights connected with it; that both the southern and northern parts of the tract continued after their severance to have the contact with the river which they had had prior to it; that in 1889 mills were built on the southern part by the predecessors of the plaintiff; that the defendant erected its

mills on the site of the sawmill on the northern part; that defendant was taking water for its mills largely in excess of the quantity required in 1888 to supply power for the sawmill; that the plaintiff contended that the defendant could lawfully receive at its mill no more water than had been required to operate the sawmill in 1888, and only when the water was not needed by plaintiff's mill or when water was flowing over the crest of the dam; that the defendant asserted that it had the privilege of taking half the water; that the defendant had never withdrawn as much as half; and that the plaintiff sought damages and an injunction restraining the defendant from taking more water than the plaintiff believed defendant was entitled to.

The Court of Appeals, reversing the judgment of the courts below dismissing the complaint, pointed out that the grant of half the water in the river in the deed of 1888 could not be construed literally because Thomson and Dix did not have the ownership or control of and could not grant one half of all the water flowing in the river at that point; and that their deed of 1888 transferred to the grantee the entire right then incident to their riparian tract, except such part of that right as they reserved to themselves by provision in the deed. In support of these conclusions the court said *inter alia*:

"The right to the use of the water of a flowing stream...is a valuable property right which can be severed from the riparian tract by grant...Thomson and Dix as owners of the single tract might release it or grant it to another or restrict or reserve it as owners of the single tract to specified uses or places... they did not own or have dominion over the water itself or, under the facts of the case, over the use of a fixed part of it. The water itself in the nature of things, did not and could not become the subject of their ownership, control or conveyance... They had a mere usufructuary right in it, subjected to the right of the state and rights equal with theirs in the owners of the opposite or western bank. Their usufructuary and proprietary right was...to draw from the dammed waters water, for the

purpose of power, in such quantity at any time as would not conflict with the right of the state or other riparian owners... Such right as an entirety or any part of it they could grant. The right measured their title to and interest in the water power in those waters and the extent of any grant and all grants of power by them."⁹⁹¹

It follows that the United Paper Board case can be cited as holding

1. That in New York, as in other states, a riparian privilege to use stream water for power can be transferred along with riparian land to which it is incident.⁹⁹²

2. That in New York when a riparian tract to which a riparian power privilege is incident is divided, one part being conveyed and one part retained, there can be severed from the part of the tract retained a fraction of the power privilege which would have continued to be incident to it after the division if a provision to the contrary had not been included in the dividing deed; and that the fraction of the power privilege so severed from the retained part of the riparian tract can be transferred along with the conveyed part of the tract with the result that the grantee thereof receives a greater fraction of the power privilege than he would have been entitled to if his claim were founded solely on his status as grantee of part of the tract. In brief, United Paper Board indicates that a riparian power privilege can be severed from the riparian land to which it is incident and transferred by its owner to another person along with other land riparian to the stream.

3. That when a riparian privilege or right is severed by its owner from the riparian land to which it is incident and is conveyed to another party, the extent of the privilege or right in the hands of the transferee continues to be limited by an obligation not to infringe upon the rights of other riparians.

Also possibly indicative of the New York common law as to the transferability of riparian privileges and rights is a dictum uttered by the court

in *City of New York v. Third Ave. Ry.*⁹⁹³ in which it appeared that the railway company owned land riparian to the Harlem River; that although the underwater land owned by the city in front of the railway company's riparian tract had been filled in out to the bulkhead line, the railway company, as riparian owner, still had the privilege of access to navigable water and could lawfully exercise it over the filled in land; that the railway company had leased part of its riparian tract to the other defendant, a coal company; that both companies had erected structures on the filled in land; and that the city's action was to recover possession of that land and damages for its use and occupation. Pointing to the finding of the courts below that the structures erected by the defendants on the filled in land were facilities for moving their goods from deep water to the riparian tract, the court rejected the city's contention that the coal company was exercising its share of the privilege of access for the benefit of land other than the riparian tract in which it had a lessee's interest; and affirmed the judgment for the defendants rendered by the courts below. The court also uttered the following dictum:

"Even if it were the fact that defendant railway company had leased to the coal company only the right to use the made lands, entirely apart from the uplands, such leasing would not be an illegal exercise by the railway company of its rights as riparian owner. (See as to severability and alienability of riparian rights...United P. B. Co. v. Iroquois P. & P. Co., 226 N.Y. 38, 47...)"⁹⁹⁴

It would seem justifiable to interpret this dictum as a statement that a riparian owner can effectively lease his riparian privilege of access to navigable water to a lessee who owns no riparian land and who will therefore be exercising it, if at all, for the benefit of non-riparian land.⁹⁹⁵

Further light is shed on the transferability in New York of riparian privileges and rights by *Federal Power Commission v. Niagara Mohawk Power Corp.*⁹⁹⁶ In this case it appeared that the Niagara Falls Hydraulic Power

and Mfg. Co., a riparian owner on the Niagara River, with permission from the United States and the State of New York to withdraw water for power, purported to convey to the Pettebone-Cataract Co., which owned no riparian land,⁹⁹⁷ the privilege of taking from that river 262.6 cfs for power; that Niagara Mohawk, a riparian owner on the river, paid large sums as rental to Pettebone for the use of its power privileges; and that if Pettebone did not have the power privilege it purported to lease, Niagara Mohawk could be required to include the rentals it had paid in its surplus earnings rather than in its operating expenses. The U.S. Court of Appeals, citing United Paper Board, held that Pettebone had acquired valid water rights under New York law from Hydraulic and said:

"The right to 262.6 cfs. though severed, continued to be in the nature of a riparian right. Such a corporeal hereditament is a property right which may be conveyed apart from the land to which it is incident."⁹⁹⁸

The U.S. Supreme Court, in affirming the decision below in favor of Niagara Mohawk said

"We accept the conclusion of the Court of Appeals 'that the...Pettebone-Cataract water rights are valid under the law of New York.'...The rights under consideration originally were attached to riparian lands above and below the Falls. However, they long have been separated from such lands and, thus separated, they have been transferred or leased to respondent."⁹⁹⁹

The Supreme Court also pointed out that further recognition of these water rights under state law had occurred in *Water Power & Control Comm. v. Niagara Falls Power Co.*¹⁰⁰⁰

It seems correct to say then that the U.S. Supreme Court has held that under New York law a riparian privilege to use a specified amount of river water for power can be severed from the riparian land to which it was originally incident and effectively transferred to a non-riparian grantee for use for the production of power on non-riparian land.

Though the information as to the New York common law with regard to the severability of riparian privileges and rights supplied by United

Paper Board, Third Avenue and Niagara Mohawk is interesting and helpful,¹⁰⁰¹ it is obviously far from complete. For example, these cases do not deal with the question as to whether or not a severance of riparian privileges and rights from the riparian land to which they are incident will be effective as against third persons having interests in the lake or stream involved, such as other riparian owners who are not parties to the severance transaction.¹⁰⁰² It is true that United Paper Board seems to give an affirmative answer to this question by implication; for the court defines the extent of the riparian privilege of the transferor as usufructuary and subject to the equal rights of other riparian owners and as entitling him to draw for power purposes only so much as he could without infringing the rights of such owners. The court added that it was a privilege so defined which the riparian could transfer, and that its extent determined the extent of the privilege received by the transferee.¹⁰⁰³ From these statements it is easy to infer, and difficult not to infer, that in the opinion of the court a severance of a riparian privilege from the riparian land would be good as against third parties, because by so defining the extent of the transferred privilege as to preserve for third parties all the rights they had prior to the transfer, no satisfactory basis would remain for a rule that a transfer would not be good as against them.

But the fact remains that in United Paper Board there was no attack on the validity of the transfer by any riparian owner who was not a party to it, so the court was not squarely faced with the question as to whether such an attack could succeed. It is therefore conceivable that a New York court today, despite the unqualified assertions in United of severability of riparian privileges and rights, and despite the ease with which a holding that a severance of such interests would be good as against third parties could be implied from the court's statements,¹⁰⁰⁴ might take the position that the question as to the validity against third parties of a severance of riparian interests from riparian land was left open by United Paper Board, and might decide to follow the holdings in other jurisdictions that such a severance could not be valid because it would be impossible for a riparian owner to reserve to himself or transfer

to another a privilege to use lake or stream water for the benefit of non-riparian land, since he would have no such privilege at the time of the severance.¹⁰⁰⁵

Neither Third Avenue nor Niagara Mohawk precludes this possibility; for in neither case was an attack made on the transfer involved by riparian owners who were not parties to it, and in neither case did the court make statements comparable to those appearing in the United Paper Board opinion which might serve as the basis for an implication of a holding that the transfer would be good as against third parties. Moreover in Third Avenue there was a finding that the activities of the transferee of the privilege of access did not conflict with the public interest in navigation;¹⁰⁰⁶ and there is nothing in Niagara Mohawk indicating that either the state in its capacity as riparian owner¹⁰⁰⁷ or any private riparian owner not a party to the transfers ever questioned their validity.¹⁰⁰⁸ Neither case can therefore be cited as having passed on the validity against third parties of severances and transfers of riparian privileges and rights.¹⁰⁰⁹

Another important question in the field of severability of riparian privileges and rights from the riparian land to which they are incident which is not clearly answered by the holdings or even by the dicta in United Paper Board, Third Avenue and Niagara Mohawk is the following: assuming that the New York common law rule is that severance of riparian interests from the riparian land to which they are incident can be valid as against third parties, can this rule be applied to validate severances of consumptive water privileges and the protective rights ancillary thereto, such as the privilege of reasonable use for irrigation¹⁰¹⁰ and the right that the enjoyment of that privilege shall not be unreasonably interfered with. To be sure, the opinions in these cases contain declarations as to severability broad enough to include consumptive privileges and rights, and give no warning that such interests might be held to be non-severable if the question should ever arise in New York.¹⁰¹¹ It should be remembered, however, that the privileges involved in United Paper Board and Niagara Mohawk were power privileges which are usually classified as non-consumptive because the water losses resulting from their exercise are normally relatively small,¹⁰¹² and that the privilege involved

in Third Avenue was one of access which is clearly non-consumptive. It could, therefore, be argued that these cases cannot be cited as sustaining the severability of consumptive riparian privileges and rights.

The possibility that the occasional expressions of doubt as to the severability of such interests might influence the New York courts should be borne in mind. If a litigant in a New York court, contending that consumptive water privileges are non-severable, should cite *Hanford v. St. Paul & Duluth Rr. Co.*¹⁰¹³ the court would note that while it was held in that case that a riparian privilege of access was freely severable and transferable because the state was not concerned as to whether the owner of the adjacent upland or some person to whom he might transfer his right exercised the privilege and because the rights of other persons would not be involved,¹⁰¹⁴ that holding was accompanied by the following statements which, despite the absence therefrom of express reference to consumptive privileges, seem to have been made with such privileges in mind.

"We do not affirm that all riparian rights are thus severable. Some, from the very nature of things, may be incapable of separate existence¹⁰¹⁵...If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining."¹⁰¹⁶

Even though it seems probable that a consumptive water privilege can, without undesirable consequences, be severed from and transferred apart from the riparian land to which it was incident, because riparians and other persons not parties to the severance will be protected against an infringement of their rights, in conformity with the position taken in *Smith v. Stanolind Oil & Gas Co.*,¹⁰¹⁷ and even though the *Smith* case method of determining the extent of the privilege of the transferee was the one chosen in *United Paper Board* long before the *Smith* case was decided,¹⁰¹⁸ it is conceivable that a New York court might view the

question as to the severability of consumptive water privileges as an open one in New York¹⁰¹⁹ and hold them non-severable for one or more of the following reasons: first, because while there appears to be no case actually holding that a consumptive water privilege is non-transferable simply because it is consumptive - the decisions in cases in which such privileges are held non-severable being based on the general doctrines that riparian privileges and rights are non-severable as against third parties¹⁰²⁰ or that one cannot transfer a privilege of non-riparian use which he himself does not have,¹⁰²¹ rather than on the consumptive nature of the privilege involved - the number of decisions upholding the severability of consumptive privileges, while appreciable, is not large;¹⁰²² and second, because United does not preclude a holding that consumptive privileges are non-severable as the privilege involved in that case was non-consumptive.¹⁰²³

There being, then, uncertainty in the existing New York law as to whether the severance of riparian privileges and rights can be valid as against third persons, such as riparian owners not parties to the severance, and uncertainty as to whether if a rule validating such a severance as against third parties does exist, that rule is broad enough in scope to be applicable to the severance of consumptive privileges and rights, the problem remains as to whether the needed clarifying legislation should give affirmative or negative answers to these questions. It is submitted that there are cogent reasons why the clarifying statute should provide in substance that severance of riparian interests, whether consumptive or non-consumptive, from the riparian land to which they are incident are valid as against third parties.

It has often been pointed out that the public interest requires that water be put to its most advantageous use at any given time, and that no system of water law can therefore be viewed as satisfactory unless it permits the transfer without undue difficulty of interests in water from one owner to another whenever use of the water by a new owner would be of greater economic or social advantage than the use of those interests being made by their present owner.¹⁰²⁴ If the New York courts should

hold that the severance of riparian privileges and rights from riparian land is not valid as against third parties, it would put a serious obstacle in the way of effecting desirable shifts in the pattern of water use by precluding resort to a way of effecting such shifts which would be of interest to both private parties and governmental bodies in certain situations: for example, when the present owner of riparian land is willing to part with his riparian privileges and rights but wishes to retain his riparian land;¹⁰²⁵ or when the prospective purchaser has no need for any riparian land, because the new use he contemplates will not be dependent on his ownership of any, provided he can obtain riparian privileges and rights without acquiring the land to which they are incident.¹⁰²⁶

Despite the possession by governmental bodies and agencies of the power of eminent domain, it would seem that they, as well as private purchasers of water interests, would be impeded in effecting desirable shifts in the pattern of water use¹⁰²⁷ under either of the two concurrently prevailing theories as to the consequences of the condemnation of a property interest, if they sought to acquire water privileges and rights in a jurisdiction adhering to the view that transfers of such water interests are not valid as against third parties.¹⁰²⁸ Under one theory as to the consequences of eminent domain the property interest of the condemnee is transferred to the condemnor by a sale consummated against the will of the condemnee.¹⁰²⁹ If a court which adhered to the view just referred to accepted this theory of eminent domain, it might well feel constrained to hold in a case in which a governmental condemnor elected to condemn a riparian privilege or interest without the riparian land to which it was incident that although the condemnor had acquired a privilege or right valid as against the condemnee it had not acquired one which was valid as against third parties,¹⁰³⁰ in view of the applicability under this theory of the general rule that a seller can convey no greater interest than he has.¹⁰³¹

If such a holding were rendered, governmental bodies and agencies which would have no use for any riparian land, and which therefore wished

to acquire nothing more than riparian privileges and rights,¹⁰³² and which did not need the riparian privileges and rights of all of the riparian owners on the lake or stream involved, would be left with the alternative of condemning the riparian land as well as the riparian interests of those riparian owners whose riparian privileges and rights they wished to acquire, or of condemning the riparian interests without the riparian land of all of the riparian owners. In any case in which the governmental body or agency had actual need for no more than the riparian privileges and rights of less than all of the riparian owners neither of these alternatives would be as desirable as the acquisition without any riparian land of no more than the riparian privileges and rights actually required.

It seems doubtful, moreover, that a governmental condemnor would be in any better position under the other currently prevailing theory as to the condemnation of a property interest, which has been stated as follows:

"One school of thought holds that the acquisition of private property by an exercise of the power of eminent domain is a proceeding in rem. The power acts upon the land itself, not upon the title, or upon the sum of the titles if there are diversified interests. Upon appropriation all inconsistent proprietary rights are divested and not only privies but strangers are concluded. Thereafter, whoever may have been the owner, or whatever may have been the quality of his estate, he is entitled to full compensation according to his interest and to the extent of the taking, but the paramount right is in the public, not as claiming under him by a statutory grant, but by an independent title. Thus, it has been said:"

"There can be no question but that the condemnation proceeding which was a proceeding in rem, gave title to the United States, good against the world,...'Such an exercise of eminent domain founds a new title and extinguishes all previous rights.'"¹⁰³³

While under this theory a court, even if bound by a rule that a severance of a riparian interest from the riparian land to which it was incident is invalid as against third parties, could hold that the governmental condemnor had acquired as against riparians on the body of water involved other than the condemnee a new and independent rather than a derivative title to the precise interest which it had elected to condemn because no transfer was involved, the court would probably also hold that the condemnor had become obligated to make compensation to the other riparian owners,¹⁰³⁴ because the condemnation could not be held to have been fully effective as against them without also holding that it destroyed their common law right that riparian rights and privileges should not be exercised and enforced for the benefit of non-riparian land and their common law power to treat a severance of a riparian interest from riparian land as invalid with respect to them; a right and a power which under certain circumstances could have considerable monetary value. The practical effect of such holdings would be that the governmental condemnor would have been forced to acquire at least part of the riparian interests of all the riparian owners on the lake or stream despite the fact that it had elected to try to acquire no more than the riparian privileges and rights of certain specified riparian owners. Analogical support for the conclusion that the governmental condemnor would incur liability to third party riparians seems to be afforded by the holdings that where mortgaged land is condemned, the condemnor, although acquiring a title good as against all the world, must give compensation not only to the owner-mortgagor but also to the mortgagee for the destruction of his power to sell the land for the satisfaction of the debt owed him by the mortgagor in the event of default in payment.¹⁰³⁵

On the other hand, if the rule were established by statute that a severance of riparian privileges and rights from the riparian land to which they are incident is valid as against third parties, but subject to the condition that the reservor or transferee shall not infringe on the rights of other riparians, a governmental condemnor

which wished to acquire the riparian privileges and rights without the riparian land of less than all the riparian owners on a lake or stream would appear to be in a satisfactory position under either of the theories referred to above as to the consequences of the condemnation of a property interest. Under the theory that a condemnation results in a transfer of the condemnee's interest to the condemnor by a sale against the will of the condemnee, a governmental condemnor would acquire an interest as great but no greater than that of the condemnee because measured by it;¹⁰³⁶ that is, an interest which, like that of the condemnee, would be subject to the riparian privileges and rights of the riparian owners not parties to the transfer,¹⁰³⁷ and to any prescriptive water privileges and rights which third parties might have acquired against the condemnee.¹⁰³⁸ The governmental condemnor, therefore, would be obligated to pay the condemnee no more than the value of such an interest, which is entirely proper since it did not wish to acquire any greater interest. The governmental condemnor would, moreover, incur no liability whatever to third parties; for under the recommended legislation they would no longer have the right that riparian privileges and rights should never be harmfully exercised and enforced for the benefit of non-riparian land nor the power always to treat severances of riparian interests from riparian land as invalid as against them; and under the recommended legislation the other privileges, rights and powers of third parties would be as extensive against the governmental condemnor as they were against the condemnee. Thus the recommended legislation would, under the involuntary sale theory of condemnation, enable a governmental condemnor to restrict the extent of the interests affected by the condemnation, and so limit the extent of the financial obligations it will incur.

Under the in rem-extinguishment theory as to the effect of a condemnation a governmental condemnor would appear to be in an equally advantageous position if a statute of the sort referred to were enacted. While under this theory the title of the condemnee to his riparian interest would be extinguished, and while the governmental condemnor would acquire a new, non-derivative title to that interest good as against the whole world,

that acquisition would not involve the destruction or even the diminution of the interests of riparian owners other than the condemnee or of the interests of the holders of prescriptive privileges and rights; for although the title of the governmental condemnor to the riparian privileges and rights which the condemnee is a new one, the scope of the privileges and rights held by the governmental condemnor under its new title would appear to be limited by the scope of the privileges and rights formerly held by the condemnee, since the interest to be condemned would have been described in the condemnation proceedings substantially in terms of the riparian privileges and rights of the condemnee.¹⁰³⁹ And if the interest acquired by the governmental condemnor is so defined, its acquisition by the condemnor will, for the reasons stated in the preceding paragraph, cause no loss whatever to third parties, and will obligate the condemnor to compensate the condemnee only for the loss of the interest which he formerly had.

In view of the importance to governmental bodies of a clearly established rule validating as against third parties severances of riparian privileges and rights from the land to which they are incident - a rule important to them because in certain situations they may have need for riparian privileges and rights but not for riparian land - and in view of the apparent scarcity of authority explicitly describing the legal position as against third parties of a condemnor of riparian privileges and rights who condemns no riparian land, it would appear to be advisable to include in any statute validating such severances as against third parties a provision that it is applicable to such severances effected by eminent domain.

There is, moreover, a compelling reason for including in such a statute a provision that it is applicable to consumptive riparian privileges and rights as well as to those which are non-consumptive. In view of the probability that the world's population will continue to increase despite the efforts now being made to check its growth, it seems highly probable that the need for food will continue to expand,¹⁰⁴⁰ and perhaps to such an extent that the public interest will require that an owner of non-

riparian land have the ability to procure from an owner of riparian land a consumptive water privilege for the irrigation of the non-riparian land. If made legally possible, such a transaction might occur if it appeared that the application to the non-riparian land of the amount of water to which the owner of a riparian tract would be entitled would be agriculturally more productive and more profitable than its use for the irrigation of a riparian tract, and if a riparian owner could expect that his economic position would be improved by the sale after taking into account the use he might make of his riparian land, though shorn of its consumptive water privileges, and the price he would receive for their sale. The inclusion of such a provision would, moreover, tend to facilitate the acquisition of municipal water supplies by eminent domain by making it clear that the severance of consumptive as well as of non-consumptive riparian privileges is valid as against riparian owners other than the condemnee.

A statute authorizing the severance of riparian privileges and rights from riparian land and incorporating the foregoing recommendations might read substantially as follows: ¹⁰⁴¹

1. A conveyance of riparian land from which none of the riparian privileges and rights incident thereto are reserved transfers all of such privileges and rights though not expressly referred to in the conveyance; and a taking of riparian land by eminent domain vests all riparian privileges and rights incident thereto in the condemnor unless expressly excluded from the description of the property to be taken. ¹⁰⁴²

2. An owner of riparian land has the power when conveying part thereof to another, which part is so located that it will have no contact with the water after the conveyance, to transfer expressly or impliedly to the grantee of said part of the riparian tract the riparian privileges and rights ¹⁰⁴³ which were incident to said part prior to its conveyance. ¹⁰⁴⁴

3. An owner of riparian land has the power to sever therefrom all or part of the riparian privileges and rights incident thereto

by reserving all or part of them to himself for use for the benefit of other land, whether riparian or non-riparian, when conveying all or part of his riparian land to an owner of other riparian land or to a person who owns no riparian land; or by transferring all or part of such privileges and rights to an owner of other riparian land or to a person who owns no riparian land while retaining all or part of his riparian land.

4. A person who owns a riparian privilege or right which has been severed from the riparian land to which it was originally incident has the power to transfer it, either with or without the land for the benefit of which he may have been enjoying it, to the owner of riparian land or to a person who owns no riparian land.

5. Subject to the provisions of sec. 6, all of the reservations or transfers of riparian privileges and rights effected by the exercise of the powers referred to in secs. 2, 3 and 4 are valid not only as against the parties thereto, but also as against persons who, though not parties to the reservation or transfer, have interests in the body of water in which the reserved or transferred privileges and rights exist, such as the owners of prescriptive water privileges or rights or of riparian privileges and rights incident to land owned by them and riparian to such body of water.

6. A riparian privilege or right which has been severed from riparian land by reservation or transfer has the same extent in the hands of any reservee or transferee as it had in the hands of the severor: viz, the privilege may be exercised and the right may be enforced to an extent which is reasonable under all the circumstances and which does not therefore violate the rights of persons not parties to the severance.

7. The provisions of secs. 2 to 6 inclusive apply to the severance of a consumptive privilege or right as well as to the severance of a non-consumptive privilege or right; and to the severance of a riparian privilege or right effected by a condemnation thereof

which does not include the riparian land to which such privilege or right is incident as well as to severances voluntarily effected by an owner of such privilege or right.

Much of the reasoning which leads to the conclusion that the Harmful Use Bill, if enacted, could withstand constitutional attack,¹⁰⁴⁵ also leads to the conclusion that the statute recommended at this point, if adopted, should and probably would be held to constitute a valid exercise of the police power, and so not vulnerable on due process grounds.¹⁰⁴⁵

Sec. 4. Clarification of Uncertainties as to What Land Is Riparian.

- a. How Much of a Tract Bordering on a Lake or Stream Can be Classified as Riparian? (For development of this topic see Farnham, The Permissible Extent of Riparian Land, 7 Land & Water L.R. 31 (1972).)
- b. What Tracts of Land within the Boundaries of a Municipality Located on a Lake or Stream are Classifiable as Riparian?

Although the rule that land cannot be riparian unless it has contact with a natural body of water has general prevalence,¹⁰⁴⁶ there appear to be no New York judicial decisions or dicta explicitly declarative of such a requirement. But as the rule seems never to have been questioned in New York or in other states, and as there are statements in the opinions of New York courts which apparently assume that the rule is a component of the riparian doctrine in force in New York,¹⁰⁴⁷ the probability is that if a case should arise in which a New York court would find it necessary either to accept or reject the rule, the court would treat it as one which had always been in force in all riparian doctrine states, including New York.

If these premises are correct, it could be argued that it necessarily follows that the only land in a city situated on a natural body of water which can be classified as riparian in New York are those tracts which border on the lake or stream, and that the use of water therefrom on or for the benefit of any tract of land in the city which does not have

contact with the lake or stream is a non-riparian use, the legality of which is determined by the law applicable to that sort of use.¹⁰⁴⁸ Yet as far as the author is aware, no New York court has so held or so stated. While it is true, as previously pointed out, that the New York courts have uniformly held that diversions of lake or stream water for municipal supply which are harmful to the riparian owners on such bodies of water constitute compensable violations of riparian rights, and without even mentioning the possibility that the land parcels benefited by such a use could be classified as riparian, and so appear to concur in the view adhered to in the majority of states which have passed on the question that use for municipal supply cannot be classified as a riparian use,¹⁰⁴⁹ the possibility is real, despite the odds against it, that a New York court might in a future case take a contrary position in accord with the results reached in a few states¹⁰⁵⁰ notwithstanding the general rule that land cannot be riparian unless it has contact with the water.

For several reasons it is submitted that the uncertainties in New York law above pointed out, though their existence is doubtful rather than obvious, should be eliminated by the enactment in New York of legislation making it clear that land must border on the water if it is to be classified as riparian, and that this rule applies to cases involving the classification of land to which water is supplied by a municipality. In the first place, whether or not a claimant of riparian privileges and rights actually owns those which he claims depends at common law in most riparian doctrine jurisdictions on whether or not he owns an interest of the required size in riparian land.¹⁰⁵¹ It is obvious, therefore, that unless a statute alters this situation the rules as to what land can be classified as riparian should be as definite and certain as possible.

In the second place, the continued existence of uncertainty as to whether or not land which has no contact with a stream or lake but lies within the boundaries of a municipality situate on a stream or lake can be classified as riparian for the purpose of deciding whether or not the municipality is making a riparian use of the water with which it supplies such land would have a tendency to discourage the initiation of water-

based activities by private enterprise. A person or corporation contemplating investment in such an activity might well be deterred from embarking upon it by the fear that at some future time the New York courts might take the position that use of water for the supply of any land within the municipal boundaries was a riparian use, and therefore hold that the municipality was entitled to divert for municipal supply an amount of the water in the lake or stream which, though reasonable under all the circumstances in the eyes of the court, would so diminish the amount of water available for the private activity that it could no longer be continued profitably.¹⁰⁵²

If it be argued in support of that result that it would be desirable because consistent with the variability principle of the riparian doctrine by virtue of which existing uses of lake and stream water may be curtailed to the extent necessary to make it possible to initiate additional reasonable uses,¹⁰⁵³ it can be pointed out in rebuttal that, except in jurisdictions adhering to the minority rule legalizing harmful non-riparian uses if they are reasonable under all the circumstances, the variability principle has thus far been looked upon as one which could be invoked only by persons making or contemplating uses for the benefit of riparian land;¹⁰⁵⁴ and that to allow the definition of riparian land to be so expanded as to include large areas of land having no contact with the water, provided only that they lie within the boundaries of a municipality which comprises a tract of land, however small, that does have such contact, would be so greatly to increase the amount of land which could derive benefit from the variability principle as to make its operation in this instance harmful rather than beneficial in the long run. Thus it can be argued that when lake or stream water is preempted for public supply it is more just, and so in the long run more consistent with the public interest, to require the municipality to pay for that supply and spread the cost over its numerous beneficiaries by taxation or by water-use charges, than to require the riparian owners harmed by a municipality's diversion of water to bear their losses without compensation.¹⁰⁵⁵ The steady adherence in New York through the years to the policy of requiring municipalities to make compensation to private riparian owners either by negotiated purchase

of riparian privileges and rights or by the exercise of eminent domain,¹⁰⁵⁶ even in the absence of New York judicial decisions explicitly to the effect that the supply of water to tracts of land within the borders of a municipality which have no contact with the water is a non-riparian use, warrants the inference that this argument is looked upon as valid by a majority of the people and of the legislative bodies of New York.

If it be asked why, despite the tenor of this majority view, there should be concern over the uncertainty in the New York law resulting from this lack of explicit judicial decision, it can be replied that it is quite likely that an appreciable number of individuals and legislative bodies in New York State are actually opposed to its present policy in regard to compensation for water diverted for municipal supply, and that if an individual entertaining this view, or if a New York legislative body of the same mind should deem it advisable to authorize the formulation and execution of such a project, he or it might well be tempted by the lack of explicit judicial rulings in New York to the contrary to proceed on the assumption that there was a real chance that the New York courts, when squarely faced with the question, would hold that any tract of land within the borders of a municipality situate on a lake or stream is riparian land, even though it has no contact with the water, and that the legality of a municipal supply of lake or stream water to such a tract of land is governed by the law applicable to riparian uses. If this were the actual outcome a rule would be established which, for the reasons set forth above, would be contrary to the public interest. Even if the court arrived at the more desirable result by holding that the rule that land could not be classified as riparian unless it had contact with the water applied to municipal supply cases, delay in the completion of an urgently needed water supply project could occur while it was being reformulated in the light of the increased compensation costs which the court's decision required the municipality to bear, and while arrangements for additional financing were being made.¹⁰⁵⁷ In view of the foregoing it would seem desirable to eliminate these hazards by enactment of the recommended legislation.¹⁰⁵⁸

FOOTNOTES

CHAPTERS 1 - 8

- 1 - The preparation of this book and the research on which it is based have been supported under a joint project of the Office of Water Resources Research of the United States Department of the Interior, of the New York Temporary State Commission on Water Resources Planning (recently succeeded by the New York Joint Legislative Committee on the Conservation, Development and Equitable Utilization of the Water Resources of the State), and of the Cornell University Water Resources Center.
- 2 - See 3 Kent's Commentaries (1st ed.) 353-5 (1828); *Palmer v. Mulligan*, 3 Caines' Reports 308, 317, 319 (N.Y. Sup.Ct., 1805); *Sackrider v. Beers*, 10 Johnson's Reports 240 (N.Y. Sup.Ct., 1813); *Merritt v. Brinkerhoff*, 17 Johnson's Reports 306, 320-1 (N.Y. Sup.Ct., 1820); *Arnold v. Foot*, 12 Wendell 330 (N.Y. Sup.Ct., 1834).
- 3 - Dealing, for example, with land drainage, pollution control, public water supply, hydroelectric power, navigation and related matters, stream protection and regulation, fishing, multi-purpose water resources planning, interstate water compacts, and cooperation with the federal government.
- 4 - More than 100 years ago the draftsmen of a proposed New York Civil Code (The Civil Code of the State of New York, reported complete by the Commissioners of the Code, 79 (1865)), often referred to as the Field Code, included in the article thereof dealing with the incidents of land ownership the following section: "Sec. 256. The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue, nor pollute the same." The brevity and generality of this section suggest that the precise formulation of the riparian doctrine and the definition of the extent and duration of riparian rights were not viewed as urgent necessities in New York in 1865. But whether this inference be true or false, the fact remains that this section failed of adoption along with the proposed code of which it was part. The substance of this section was, however, adopted in a few other states. See, for example, S.Dak. Code of 1939, sec. 65,0101, repealed L. 1955, c.430 (1960 Supp. to S.Dak Code of 1939, p. 350).
- 5 - As does the Canal Law in sec. 40(11), the Environmental Conservation Law in secs. 15-1107, 15-1113 and 15-1705, and the Public Health Law in secs. 1167 and 1260. These sections, of course, necessarily imply the prevalence in New York of some version of the riparian doctrine as to water rights.
- 6 - That water law is uncertain elsewhere in the east, see Plager, Law of Water Allocation, 1968 Wis. L.R. 673,683.

- 7 - The text of sec. 15-0701 of the Environmental Conservation Law appears at p. 23, post. The need for its enactment and its beneficial effects are pointed out at p. 8-42, post.
- 8 - See the following reports of the New York Temporary State Commission on Water Resources Planning: Leg. Doc. (1961) No. 42, p. 116; Leg. Doc. (1962) No. 32, pp. 85-89; Leg. Doc. (1966) No. 9, pp. 57-60, 87-90 & 197. See also generally the reports of the following New York bodies rendered in the period beginning in 1950: Joint Legislative Committee on Interstate Cooperation; Temporary State Commission on Irrigation; Joint Legislative Committee on Natural Resources; Joint Legislative Committee on Revision of the Conservation Law. For a statement that legislation clarifying water rights should be a part of any overall water plan for Illinois see Cribbet, Illinois Water Rights Law, 50 (1958). The first of ten recommendations made in the October, 1966 report to the Governor of Minnesota of the Minnesota Water Resources Review Committee was that a more precise definition of Minnesota water rights be developed in order to encourage a more efficient use of water resources by society. (1967 Report of the Water Resources Committee of the Section of Mineral & Water Resources Law of the American Bar Association, 223.) For a statement that as the demands on water resources grow, the necessity for legislation to define more explicitly the relations between riparian owners will become more evident see Aycock, N.Car. Water Use Law, 46 N.Car. L.R. 1,20 (1967).
- 9 - That uncertainties as to water rights can be expected to discourage private investment in them see Trelease, Policies for Water, 5 Nat.Res.J. 1,23 (1965); Champion, Prior Appropriation in Mississippi, 39 Miss. L.J. 1,37 (1967); Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water, 43 Ind.L.J. 383,4 (1968); Davis, Australian & American Water Allocation Systems Compared, 9 Bost.Coll.Ind. & Com'l L.R. 647,677 (1968).
- 10 - O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549,577 (1962); Plager, Law of Water Allocation, 1968 Wis.L.R. 673,689; Rarick, Oklahoma Water Law, 23 Okla.L.R. 19,63 (1970).
- 11 - Maloney, Eastern Laws Concerning Minimum Stream Flows, Papers South-eastern Water Law Conference, 301, 8 (1961); Michelman, Just Compensation, 80 Harv.L.R. 1165, 1241 (1967).
- 12 - Maloney, Eastern Laws Concerning Minimum Stream Flows, Papers South-eastern Water Law Conference, 301,8 (1961); H.H. Ellis, Developing Trends in Water Law in the Eastern States, Proceedings Pa. State Water Resources Law Colloquium, 24,7 (1967).

- 13 - The writer's opinion is based in part on conversations with persons familiar with the attitude of New York farmers, and on accounts of statements made by New York industrialists to state water officials and at conferences on New York water law problems. He also finds support for his opinion in Martin, *Water for New York*, 105 (1960); 1966 report of the New York Temporary State Commission on Water Resources Planning, Leg. Doc. (1966) No. 9, p. 197; and in the 1968 report of the New York Commission on the Preservation of Agricultural Land at p. 27 which recommends that the Water Resources Commission provide irrigation permits that would be attached to land so long as it remained in agricultural use. Although in some situations uncertainty as to the extent and duration of water rights will have little or no deterring effect on investment in water-dependent enterprises (Lauer, *Reflections on Riparianism*, 35 Mo.L.R. 1, 15 (1970)), it seems probable that there are other situations in which such uncertainty could be a decisive factor, and that they would be sufficiently numerous to warrant an attempt, limited in scope by the caveat voiced in fn. 16, to reduce the amount of existing uncertainty with respect to riparian rights and privileges.
- 14 - Carver, *A Federal Policy for Development of Western Water*, 14 Rocky Mt. Min. Law Inst. 473,4 (1968).
- 15 - The injustice of legislation which would substantially infringe existing riparian rights without providing compensation to the injured riparian owners, and the opposition which would be aroused by an attempt to pass such legislation are pointed out in Farnham, *Improvement of New York Water Law*, 3 Land and Water L.R. 377 (1968) at pp. 410, 418 & 424-5.
- 16 - The need for legislation indicating the extent of riparian rights is stressed in *Harrell v. City of Conway*, 224 Ark. 100, 271 S.W. (2d) 924, 928-9 (1954); but the goal should be a reduction in the number of rather than the complete elimination of the uncertainties in New York riparian law, because there are some uncertainties which for cogent reasons it would be advisable to preserve to a limited extent. See Farnham, *Improvement of New York Water Law*, 3 Land and Water L.R. 377 (1968) at pp. 405-411.
- 17 - For information in regard to this plan see N.Y. State Water Resources Commission, *Developing and Managing the Water Resources of New York State* (1967), especially at p.23. As to the immediate and urgent need for the formulation and execution of a plan to provide more water for New York City, see N.Y. Times, April 7, 1969, p. 37M.
- 18 - Although it could be argued that part V of art. 5 was not applicable to this plan because of its statewide scope and because part V might conceivably be interpreted as applicable only to planning for regions of the state rather than to statewide planning in view of the fact that the only plans expressly referred to in part V are regional plans, it seems unlikely that the New York courts would construe the legislative intent so restrictively.
- 19 - See, for example, *Matter of Van Etten v. City of N.Y.*, 226 N.Y. 483,7, 124 N.E. 201 (1919).

20 - "In the building of a road, taking of land or a building obviously involves compensation and the question is, 'How much?'. In the water field we are going to have two questions: 'Is this man entitled to compensation?' and 'If so, how much?'. "--Public Health Service, Symposium on Stream Flow Regulation for Water Quality Control (paper by Stein, Flow Regulation for Water Quality Control and Water Rights), 52 (1965). That in determining whether a taking of property of a riparian owner in the constitutional sense has been effected by an interference with his rights in the water or in the bed of the stream, the first step is to determine what his rights are, see 2 Nichols on Eminent Domain (3d ed.) 219 (1963). The importance to government of knowledge as to the rights of riparian owners and as to their value when resorting to eminent domain in the course of the execution of a public water project, has recently been emphasized (Johnson, Condemnation of Water Rights, 46 Tex. L.R. 1054, 1088, 1094 (1968); Neville, Eminent Domain-Valuation, IV Land and Water L.R. 193, 9 (1969)), and is demonstrated by U.S. v. 531.13 Acres of Land, 366 F (2d) 915 (1966), cert.den., 385 U.S. 1025 (n. 777 (1967)); by the dissenting opinion in Rose v. State of N.Y., 29 A.D. (2d) 1003, 289 N.Y.S. (2d) 553 (1968); and by the questions as to the destructibility without compensation of unused riparian rights, and as to their valuation, which would be faced by an eastern state if it should consider the advisability of resolving the difficulties posed by unused riparian rights by buying them up and incorporating them into the water rights of huge districts that would include the former riparian lands, as has been done in some instances in California. As to the California practice see Western Resources Conference Papers (paper by Trelease) 209 (1959). As to whether unused riparian rights can be taken without compensation despite the due process clauses, and as to whether they should be so taken, even if constitutionally permissible, see fn. 15, ante. Of course, uncertainty as to the legal consequences of a project does not always seriously delay its execution. Though inferences can be drawn from Kansas v. Colorado, 206 U.S. 46, 46 S.Ct. 118, 51 L.Ed. 956 (1907), commented on at p. 3, post, and from Connecticut v. Massachusetts, 282 U.S. 660, 51 S.Ct. 286, 75 L.Ed. 602 (1931), commented on at p. 161, post, tending to support the conclusion that a state which withdraws water from a river pursuant to a U.S. Supreme Court decree is not liable to the riparian owners in another state who are harmed by the withdrawal, New York City's diversion of water from the Delaware River for municipal supply under such a decree was begun without definite knowledge as to whether Pennsylvania riparian owners harmed by such diversion could recover damages from the city. The cases cited above do not pass on the point squarely, and there appear to be none which do. The point has been raised but not yet decided in Elwood v. City of N.Y., 271 F.Supp. 62 (1967). "...modification of the riparian doctrine would enhance the functioning of mechanisms whose purpose is to permit joint and cooperative development of water resources for public supply. For example, legislation declaratory of the scope and extent of the riparian right would add clarification and certainty to acquisition and condemnation of water rights."--Lauer, Reflections on Riparianism, 35 Mo.L.R. 1, 23 (1970).

- 21 - "As stated by Justice Norvell at the Eminent Domain Institute: 'Life is becoming too complicated for us to rely upon hit-or-miss methods and uneducated guesses. Whole projects may be hampered seriously by some unfortunate lawsuit resulting in an award of damages in an amount wholly unanticipated at the time the project was conceived. When this happens, it is indicative that a mistake has been made - either by those in charge of planning the project or by those empowered to estimate the damages which must be paid to the landowner under the constitutional mandate. It is essential that both the planners and assessors have accurate information. When guesswork and estimates from unqualified persons are relied upon, the end results cannot be satisfactory either to the landowner or to the public.'"--Davidson, Application of Limitations as to Damages Caused by Public Improvements, 16 Bay.L.R. 32, 48 (1964). An example of such an unsatisfactory result is afforded by Petition of Clinton Water Dist. of Island County, 36 Wn. (2d) 284, 218 P. (2d) 309 (1950) in which it appeared the the district was attempting to secure by eminent domain the privilege of taking water from a lake to furnish a supply for domestic uses; that the extent and compensability of the privileges and rights of the riparian owners on the lake after the superimposition of the prior appropriation system on the riparian system were still uncertain although the superimposition had been effected by many years previously; and that because the district had made a bad guess as to the conclusion at which the courts would arrive when resolving this uncertainty, the district found itself confronted with a condemnation award which would make the cost of its project prohibitive. The court pointed out that this was a situation in which many condemnors had found themselves (218 P.(2d) at 314); and this statement was repeated in Botton v. State, 69 Wn. (2d) 751, 420 P. (2d) 352, 9 (1966). "...legislation declaratory of the scope and extent of the riparian right would add clarification and certainty to acquisition and condemnation of water rights."--Lauer, Reflections on Riparianism, 35 Mo.L.R. 1,23 (1970).
- 22 - "Whether the threat of federal nonspending is regarded as a carrot or a stick, it can act as a powerful inducement for a state to review its water laws. Aside from such consideration, the states should seriously study the need for revision of their laws. It is easy to be complacent about water law, to adopt a wait-and-see attitude, to say that there is no present emergency crying for action. But if this attitude is taken, the state may never know what it has lost through the lack of development."--Trelease, A Model State Water Code for River Basin Development, 22 Law & Contemp. Probs. 301, 321 (1957).
- 23 - 16 U.S.C., sec. 1004(1)
- 24 - 43 U.S.C., sec. 422d(b)
- 25 - See also the Consolidated Farmers Home Administration Act which contains a section (7 U.S.C., sec. 1926) providing that the amount of a federal grant to finance water projects in rural areas shall not exceed 50% of the development cost of the project, and that it includes the cost of necessary water rights. It would seem clear that in any state in which the extent of private water rights is uncertain, it will be difficult to calculate their cost and the size of the permissible grant.

- 26 - In *Emery v. Knapp*, 167 Kan. 546, 207 P. (2d) 440,3 (1949) the court pointed out that the U. S. Government had declined to proceed with construction of dams and distribution works until the diversion privileges of water users had been determined.
- 27 - As in 43 U.S.C., sec. 383
- 28 - 42 U.S.C., sec. 1962d-4(3). As it is conceivable that Congress, when imposing this requirement, realized that a plan complying with it would probably be more acceptable to the states and other local entities if it called for implementing federal legislation which followed the Reclamation Acts pattern rather than that of the federal water project statutes founded on the commerce power under which disadvantaged riparian owners receive no compensation for loss of water use (Morreale, *Federal Power in Western Waters*, 3 Nat.Res.J. 1,20,75 (1963); Meyers, *The Colorado River*, 19 Stan.L.R. 1,47 (1966)), it is likewise conceivable that Congress will be thinking in Reclamation Act rather than in commerce power terms when it enacts the implementing legislation. There would seem to be no conclusive reason why the Reclamation Act principle of respecting private water rights created by state law should not be applied for the protection of private riparian rights in substantially the same way it has been applied for the protection of private appropriative water rights. 43 U.S.C., sec. 390b appears to apply Reclamation Act principles to some projects in which the Corps of Engineers plays a part. It would seem that such principles could be made applicable to projects to be executed solely by the Corps. That in the west the reclamation program "has become one in which water may be provided for power, municipal, commercial and industrial use" see 2 *Waters and Water Rights*, secs. 110.2,122.2 & 122.3 (1967). For a recommendation that the benefits of the sort of legislation exemplified by the Reclamation Acts be extended to the eastern states in aid not only of irrigation but of other water uses as well, see *Corker, Save the Columbia River for Posterity*, 41 Wash.L.R. 838, 852 (1966). See also *Bielefeld, Navigability in the Missouri River Basin*, 4 Land & Wat.L.R. 97, 104 (1969) as to the application of Reclamation Act principles to some of the projects included in the Pick-Sloan plan for the development of the Missouri River Basin authorized by the Flood Control Act of 1944; and *Trelease, Reclamation Water Rights*, 32 Rocky Mt.L.R. 464,5 (1960). "All we do is to say that whatever the constitutional basis of the Federal point may be--whether the commerce clause, the property clause, the war power, the general welfare, or whatever--when the United States exercises its constitutional power to consider a project for the development and use of water resources, and the construction or operation of that project causes damage to, or conflicts with pre-existing property right in those which arose under the laws of the State, then the Federal power may, of course, be exercised, but compensation shall be paid for the taking of the water right, just as for any other real property."-- Senator Kuchel, quoted with approval in *Carver, A Federal Policy for Development of Western Water*, 14 Rocky Mt.Min.L.Inst. 473, 491-2 (1968). See also p. 498.

- 29 - "If we are to take advantage of Federal programs and also guarantee that New York State's interests are adequately considered and protected, we must be able to move when a Federal program is ready to go."--1966 report of the New York Temporary State Commission on Water Resources Planning, Leg.Doc. (1966) No. 9, p.47.
- 29a - "...the starting point for a policy review looking toward new law is a clear understanding of the present law."--Carver, A Federal Policy for Development of Western Water, 14 Rocky Mt. Mineral Law Inst. 473, 490 (1968). See also p. 494. "The legal tangle of water law and water rights also presents a very real impediment to overall planning. For planning requires and presupposes a favorable legal structure in the framework of which necessary adjustments can be made to meet the demands of the community. It is apparent that those who desire basin-wide development programs give too little recognition to the enormous problems of adjusting the already established rights in water under state and federal laws and constitutions."--Mann, The Politics of Water in Arizona 16 (1963). The importance to the U.S. Corps of Engineers of knowledge of state water law when formulating the federal water plan for the northeastern U.S. has been stressed by J. M. Kennedy, Chief, Northeastern U.S. Water Supply Study Group, Planning Division, North Atlantic Division, U. S. Army Corps of Engineers. See Proceedings 4th American Water Resources Conference 150-1 (1968). Such knowledge will, of course, be difficult to acquire if existing uncertainties in state water law are not clarified. "Law, planning, and policy should be inseparable."--Corker, Review of Water Law, Planning & Policy (1968) by Sax, 4 Land & Water L.R. 219, 223 (1969).
- 30 - "It is evident that any effort to solve the water crisis in the Eastern United States must involve some modification of the traditional riparian doctrine. It is equally clear that modification is beyond the present ability of the judiciary, which has found it increasingly difficult to perpetuate a viable common law system."--Lauer, Reflections on Riparianism, 35 Mo.L.R. 1,24 (1970). For this situation the courts in the eastern states can scarcely be blamed. Since they can improve the law only by the decision of cases, they cannot clarify, modify or fill gaps in existing water law unless cases come before them which afford them an opportunity to do so. Because water problems in the eastern states have not become acute until recently, the amount of water litigation which has been coming before the eastern courts has been small for a considerable period. That under present conditions the amount of such litigation will soon increase seems certain; but the dates at which the courts will be confronted with various important points are, of course, uncertain. Since for reasons which are pointed out herein (see pp. 27-31, 94-5 and 103-4, post), time is of the essence in the field of water law improvement, the legislatures should not leave its timing to chance, but should themselves undertake the task. In the words of Judge Cardozo: "What we need is some relief that will not wait upon the lagging years."--35 Harv.L.R. 113,7 (1921).

- 31 - For inclusion of such an approach in a list of possible alternatives which might be pursued in eastern riparian doctrine states, see Marquis, Freeman and Heath, *The Movement for New Water Rights Laws*, 23 *Tenn.L.R.* 797, 833 (1955); Lugar, *Water Rights Law & Management in West Virginia* 50 (1967)--No. 4, Public Affairs Series, West Virginia Center for Appalachian Studies; & Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 *S.Car.L.R.* 757, 769 (1969). Lugar and Guerard, however, appear to prefer the adoption of a new system. For approval of the approach suggested in the text see Cribbet, *Illinois Water Rights Law* 50 (1958) & Martz, *Water for Mushrooming Populations*, 62 *W.Va.L.R.* 1,12,20 (1959). As taking the view that satisfactory progress toward the proper allocation of water supplies can be made under the riparian as well as under the appropriation system see Fox, 1959 Proceedings, Section of Mineral & Natural Resources Law of the American Bar Association 23. The Florida Water Resources Study Commission was at one time in favor of the riparian revision approach (Maloney, *Florida's New Water Resources Law*, 10 *Un. of Florida L.R.* 119, 129 (1957)); but this choice has recently been under reconsideration. In support of the position that the eastern states could better solve their water law problems by legislative clarification and revision of the riparian system than by the adoption of the prior appropriation system see Lauer, *Reflections on Riparianism*, 35 *Mo.L.R.* 1 (1970), especially at pp. 12,18 & 23-25. That a small number of eastern states in addition to New York and Florida have already made a few revisions in their riparian law with a view to its clarification and improvement see H. H. Ellis, *Developing Trends in Water Law of the Eastern States*, Proceedings Pa. State Water Resources Law Colloquium, 24,30 (1967) citing Ga. Code Ann., sec. 105-1407; Ind. Stat. Ann., sec. 27-1401; Ky. Rev. Stat., sec. 151.210; Va. Code Ann., sec. 62-94.1 et seq. But doubt has been expressed as to the efficacy of this approach. See Dall, *Legal Aspects of Pa. Water Resources Planning*, Proceedings Pa. State Water Resources Law Colloquium, 1,13 (1967).
- 32 - The text of sec. 15-0701, Environmental Conservation Law, appears at pp. 23-6, post.
- 34 - Senate 882-A; Assembly 1571-A.
- 35 - The text of the 1968 bill, which would add secs. 429-k to 429-o to the Conservation Law, appears at pp. 215-221, post. The need for its enactment and the beneficial effects which might be expected from it, are pointed out at pp. 55-132 & 140-5, post.
- 36 - See pp. 27-31, post.
- 37 - See pp. 27-31, 94-5 & 103-4, post.
- 38 - This charge was made by a participant in a symposium-conference on water rights and water laws held by the New York Temporary State Commission on Water Resources Planning in December, 1963. See the 1964 report of that commission--Leg.Doc. (1964) No. 15, p. 145.

- 39 - In conformity with the doctrine often stated in New York judicial opinions that water must be allowed to flow as it has been accustomed to flow. Among the pre-1966 New York cases expressly recognizing the prevalence of this doctrine are *Clinton v. Myers*, 46 N.Y. 511, 7 Am. Rep. 373 (1871); *Bullard v. Saratoga Victory Mfg. Co.*, 77 N.Y. 525 (1879); and *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900).
- 40 - 4 Torts Restatement 344 (1939); Maloney, Plager & Baldwin, *Water Pollution*, 20 Univ. of Fla. L.R. 131,5 (1967) and authorities in fn. 99, post.
- 41 - VI-A Amer.L.Prop. 163,4 (1954); 5 Powell on Real Prop., sec. 712 (1962); 50 Ia. L.R. 141,3 (1964); Maloney, Plager & Baldwin, *Water Pollution*, 20 Univ. of Fla. L.R. 131,5 (1967).
- 42 - 4 Torts Restatement 345-6 (1939); *Rancho Santa Margarita v. Vail*, 11 Ca. (2d) 501,81P. (2d) 533, 558 (1938).
- 43 - Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Haar & Gordon) 38-9 (1958). It should be borne in mind that even in states following the reasonable use version of the riparian doctrine, A's withdrawal of all the water or even of a substantial part of it, will not be protected as harmless, although B does not wish to withdraw any, if the nonconsumptive use which B is making (e.g., recreational) is seriously interfered with by A's withdrawal. (*City of Los Angeles v. Aitken*, 10 Cal.App. (2d) 460, 52 P.(2d) 585 (1935); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. (2d) 174 (1944); *Taylor v. Tampa Coal Co.*, 46 So. (2d) 392 (Fla Sup.Ct., 1950); *Harris v. Brooks*, 225 Ark. 436, 283 S.W.(2d) 129, 54 ALR (2d) 1440 (1955); *Botton v. State*, 69 Washington (2d) 751, 420 P.(2d) 352 (1966); *Hutchins, Irrigation Water Rights in California*, Circular 452 Revised, Calif. Agricul. Experiment Station, 16 (1967).) But in these times such protection of recreational uses could scarcely be called wasteful. "In the East, perhaps, the pressures of population will require such an increase of recreational uses of water that industry will be forced out of some location..."--Trelease, *Policies for Water Law*, 1 Nat.Res.J. 1,30 (1965).
- 44- "The most significant election... is between the two distinct theories of the riparian right - that of natural flow and that of reasonable use."--Trelease, *Coordination of Riparian and Appropriative Rights*, 33 Tex.L.R. 24,36 (1954). For a recommendation that states whose courts have not already chosen the reasonable use version of the riparian doctrine adopt it by legislation, see Cribbet, *Illinois Water Rights Law* 50 (1958).
- 45 - As to whether there is a division of authority in Massachusetts on the more specific question see *Elliott v. Fitchburg Rr.*, 64 Mass. (10 Cush.) 191 (1852); *Ware v. Allen*, 140 Mass. 513, 5 N.E. 629 (1886); *Peck v. Clark*, 142 Mass. 436, 441; 8 N.E. 335 (1886); and Haber & Bergen *Water Allocation in the Eastern U.S.* (chap. by Haar & Gordon) 10, 20,23 (1958). Whether the Georgia cases as to the legality of presently harmless alterations in the natural condition of a body of water are

reconcilable is debatable. For digests of and comments upon them see Plager, Observations on the Law of Water Allocation, 1968, Wis. L.R. 673, 677-680.

- 46 - Decisions in accord have been rendered in other eastern states. See Plumleight v. Dawson, 6 Ill. 544 (1844); Messinger's Appeal, 109 Pa. 285, 4 A. 162 (1885); Ware v. Allen, 140 Mass. 513, 5 N.E. 629 (1886); Parker v. American Woolen Co., 195 Mass. 591, 81 N.E. 468, 470 (1907); and Solomon v. Congleton, 245 Ark. 480, 432 S.W. (2d) 865, 8 (1968). That the question as to whether a harmless alteration in a lake or stream constitutes a taking within the meaning of the due process clauses (and it would not, of course, if it were lawful) is still an open question in Indiana and Wisconsin see Waite, Beneficial Use of Water in a Riparian Jurisdiction, 1969 Wis. L.R. 864, 870.
- 47 - 38 Hun 612 (1886); affd.w.o., 104 N.Y. 674 (1887).
- 48 - For a holding in accord in a neighboring state, see Ware v. Allen, 140 Mass. 513, 5 N.E. 629 (1886).
- 49 - 156 N.Y. 213, 50 N.E. 803 (1898).
- 50 - But there would seem to be no reason why the court could not have issued a conditional decree providing for an injunction, but suspending it for so long as the defendant continued to furnish an adequate substitute supply. In McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914) the court suspended an injunction against an alteration of a stream which, though causing no harm, involved a trespass against the plaintiff, but authorized him to apply for reinstatement of the injunction if and when he began to suffer harm from the alteration.
- 51 - 62 Hun 306 (1891).
- 52 - 46 N.Y. 511, 7 Am.Rep. 373 (1871).
- 53 - 132 N.Y. 293, 30 N.E. 841 (1892).
- 54 - 91 Hun 272, 36 N.Y.S. 92 (1895).
- 55 - 66 Hun 173 (1892), affd. on op. below, 142 N.Y. 633, 37 N.E. 566 (1894).
- 56 - 162 N.Y. 278, 6 N.E. 757 (1900).
- 57 - 51 A.D. 169, 64 N.Y.S. 589 (1900), affd. w.o., 168 N.Y. 664, 61 N.E. 1131 (1901).
- 58 - 184 A.D. 514, 172 N.Y.S. 33 (1918).
- 59 - 3 Sumn. 189, Fed. Cas. No. 17, 322 (1838).

- 60 - *Adams v. Van Alstyne*, 25 N.Y. 232 (1862); *Union Mill & Mining Co. v. Dangberg*, 81 Fed. 14, 25 (1905); *Moore v. Day*, 199 A.D. 76, 86; 191 N.Y.S. 371 (1921), *affd. w.o.*, 235 N.Y. 554, 139 N.E. 732 (1923); *Knauth v. Erie River Co.*, 219 A.D. 83,87; 219 N.Y.S. 206 (1926); *City of Los Angeles v. City of Glendale*, 23 Cal. (2d) 68, 79-80; 142 P. (2d) 289 (1943); *Merriam v. 352 West 42nd St. Corp.*, 14 A.D. (2d) 383,7; 221 N.Y.S. (2d) 82 (1961); *Kuta v. Flynn*, 182 Neb. 348, 155 N.W. (2d) 795,9 (1968); Bingham, *California Law of Riparian Rights*, 22 Cal.L.R. 251,9 (1934); 4 *Tiffany on Real Prop.* (3d ed) 556,575,595 (1939); *Prop. Restatement, com. e to sec. 458* (1944); 3 *Powell on Real Prop.* 447 (1952); Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969, Wis.L.R. 864, 876. The writer has found no New York court opinion which explains why the New York cases in the water field should have taken a position which would be untenable unless it were assumed that a prescriptive privilege could be acquired against a person in whose favor no cause of action had ever arisen, while that assumption was definitely rejected in prescription cases in the fields of lateral support and air and light. See 4 *Tiffany on Real Prop.* (3d ed.) 556 (1939). The erroneous view regrettably prevails in Conn. (*Dimmock v. City of New London*, 157 Conn. 9, 245 A. (2d) 569 (1968).)
- 61 - "...to say that an action must be given the riparian to prevent prescription running against him, under the American law of prescription is to put the cart before the horse. If the cause of action is not given prescription will not run."--Bingham, *California Law of Riparian Rights*, 22 Cal.L.R. 251,9 (1934). In substantial accord see 3 *Tiffany on Real Prop.* (3d ed.) 126,7 (1939).
- 62 - *Knauth v. Erie River Co.*, 219 A.D. 83, 219 N.Y.S. 206 (1934).
- 63 - The prescriptive period is determined in New York by the time set in the statute of limitation applicable to an action to recover possession of land. (*Klin Co. v. N.Y.*, 271 N.Y. 376,3 N.E. (2d) 516 (1936).) As the New York statute of limitation applicable to such an action has recently been shortened from 15 to 10 years (CPLR, sec. 212), the prescriptive period in New York is now 10 years.
- 64 - Bingham, *California Law of Riparian Rights*, 22 Cal.L.R. 251,262-3 (1934).
- 64a - VI-A *Amer.L.Prop.* 159 (1954); Cribbet, *Illinois Water Rights Law*, 42 (1958); Trelease, *Law, Water & People*, 18 Wyo.L.J. 3,4 (1963); Lugar, *Water Rights Law & Management in W.Va.*, 21 (1967) - No. 4 Public Affairs Series, W.Va. Center for Appalachian Studies; Hutchins, *Irrigation Water Rights in Calif.*, 13 (1967) - Circular 452 Revised, Calif. Agric. Exper. Station; Aycock, *Introduction to Water Use Law in N.Car.*, 46 N.Car.L.R. 1,5 (1967); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. (2d) 174, 181 (1944). Among the New York cases recognizing this rule are *Townsend v. McDonald*, 12 N.Y. 381,391 (1855); *Townsend v. Bell*, 62 Hun 306 (1891); *Gilzinger v. Saugerties Water Co.*, 66 Hun 173 (1892), *affd. on op. below*, 142 N.Y. 633,37 N.E. 566 (1894); *Mann v. Willey*, 51 A.D. 169, 64 N.Y.S. 589 (1900), *affd. w.o.*, 168 N.Y. 664, 61 N.E. 1131 (1901).

- 64b - Bingham, California Law of Riparian Rights, 22 Cal.L.R. 251,8 (1934); Water Resources & the Law (chap. by Lauer) 210 (1958); Cribbet, Illinois Water Rights Law, 28 (1958); Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Haar & Gordon), 45 (1958); Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1,11 (1959); Martin, Water for New York, 109 (1960); Beuscher, Appropriation Water Law Elements in Riparian Doctrine States, 10 Buf.L.R. 448,9 (1961); Maloney, Eastern Laws Concerning Minimum Stream Flows, Papers Southeastern Water Law Conference, 301 (1961); O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549,577 (1962); Trelease & Lee, Transfer of Water Rights, 1 Land & Water L.R. 1, 4 (1966); 1966 Wis.L.R. 942,3; Lugar, Water Rights Law & Management in W.Va., 21 (1967)--No. 4, Public Affairs Series, W.Va. Center for Appalachian Studies; Hutchins, Irrigation Water Rights in Calif., 18 (1967) - Circular 452 Revised, Calif. Agric. Exper. Station; Hoy v. Sterrett, 2 Watts 327,332 (Pa.Sup.Ct., 1834); Fulton County Gas & Elec. Co. v. Rockwood Mfg. Co., 238 N.Y. 109,115; 144 N.E. 359 (1924); In re Water Rights in Silvies River, 115 Ore. 27, 237 P. 322, 357 (1925); Prather v. Hoberg, 24 Cal. (2d) 549, 150 P.(2d) 405, 411 (1944); Smith v. Stanolind Oil & Gas Co., 197 Ok. 499, 172 P. (2d) 1002,6 (1946); Hoover v. Crane, 363 Mich. 36,43; 106 N.W. (2d) 563 (1960). U.S. v. Fallbrook Public Utility Dist., 347 F. (2d) 48, 58 (1965). The question as to whether New York should, despite the importance of reducing the amount of uncertainty in its water law, retain this rule, is discussed in Farnham, Improvement of New York Water Law, 3 Land & Water L.R. 377 (1968) at 405-411.
- 64c - Com.h to sec. 851, Torts Restatement (1939); Bingham, California Law of Riparian Rights, 22 Cal.L.R. 251, 263 (1934); Ulbricht v. Eufaula Water Co., 86 Ala. 587,6 So. 78, 4 LRA 572 (1888); Dyer v. Cranston Print-Works Co., 22 R.I. 506,48 A. 791,5 (1901); Jones v. Conn. 39 Or. 30,64 P.855, 54 LRA 630; rehearing den., 39 Or. 46, 65 P. 1068 (1901). In Purdy v. City of Newburgh, 113 N.Y.S. (2d) 376 (Sup.Ct., 1952) the action for a declaratory judgement as to riparian rights was dismissed not because such an action was not maintainable, but because the plaintiffs failed to allege facts showing a justiciable controversy. In 1966 maintenance of such an action was expressly authorized by subd. (5) of sec. 15-0701 of the N.Y. Environmental Conservation Law.
- 65 - For statements of this rule see Torts Restatement, com. b to sec. 933 (1939); Prosser on Torts (3d ed.) 624 (1964).
- 66 - Torts Restatement, com. g to sec. 851 (1939).
- 67 - Baker v. Ellis, 292 P. (2d) 1037 (Okla.Sup.Ct., 1956).
- 68 - Torts Restatement (2d ed.), sec. 163 (1965); Prosser on Torts (3d ed.) 66 (1964). Under appropriate circumstances harmless trespasses are enjoined; e.g., to prevent the acquisition of prescriptive privileges. Since a harmless trespass is wrongful and gives rise to a cause of action in the party trespassed upon, a prescriptive privilege can have its source in a harmless trespass.

- 69 - Bingham, California Law of Riparian Rights, 22 Cal.L.R. 251,267 (1934).
- 70 - 1 Tiffany on Real Prop. (3d ed.) 38 (1939); Stanton v. Sullivan, 63 R.I. 216, 7 A.(2d) 696,8 (1939).
- 71 - Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N.Y. 38,48-9; 123 N.E. 200 (1919).
- 72 - 3 Kent's Comm. (3d ed.) 438; Smith v. City of Rochester, 92 N.Y. 463, 480; 44 Am.Rep. 393 (1883); Waterford Electric Light, Heat & Power Co. v. State of New York, 208 A.D. 273, 283; 203 N.Y.S. 858; affd.w.o., 239 N.Y. 629, 147 N.E. 225 (1925).
- 73 - Torts Restatement, sec. 822(b) (1939).
- 74 - Thus Chap. 41 of the Torts Restatement dealing with riparian rights, like Chap. 40 dealing with private nuisance, appears in Division Ten, which is entitled "Invasions in Interests in Land Other Than by Trespass". See Table of Contents of Vol. 4, pp. xvi-xviii.
- 75 - 219 A.D. 83, 219 N.Y.S. 206 (1926). As possibly in accord see Garwood v. N.Y.C. & H.R. Rr.Co., 83 N.Y. 400,7 (1881). As apparently in accord by implication, although the question as to whether harmless non-riparian uses were legal under New York common law was not referred to, see Fed. Power Comm. v. Niagara Mohawk Power Corp., 347 U.S. 239,74 S.Ct. 487, 98 L.Ed. 666 (1953).
- 76 - This doctrine is stated at p. 15, ante.
- 77 - The purport of these cases is stated at pp. 9-14, ante.
- 78 - See p. 9, ante.
- 79 - 77 N.Y. 525 (1879).
- 80 - 178 N.Y. 270, 70 N.E. 799 (1904).
- 81 - 4 Torts Restatement 345 & com.i to sec. 851 (1939).
- 82 - 4 Torts Restatement 342,3 (1939).
- 83 - The following dictum from Strobel v. Kerr Salt Co., 165 N.Y. 303,320; 58 N.E. 142 (1900) is in accord with Bullard and Pierson: "Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water causing some loss, are not regarded as an unlawful diversion...the lower owners must submit to such loss as is caused by reasonable use."

- 84 - 211 N.Y. 301, 105 N.E. 416 (1914).
- 85 - 5 Powell on Real Prop. 361 (1962).
- 86 - 211 N.Y. 301,4; 105 N.E. 416 (1914).
- 87 - 211 N.Y. 301,5; 105 N.E. 416 (1914).
- 88 - 211 N.Y. 301,6; 105 N.E. 416 (1914).
- 89 - As to this doctrine see Walsh, Equity, 293-4, fn. 24 (1930); 5 Williston, Contracts (Rev.ed.) 3992 (1937); Torts Restat., sec. 941 (1939); Prop. Restat., sec. 563-4 (1944); McClintock, Equity (2d.ed.), sec. 128 (1948); & Prosser on Torts (4th ed.) sec. 90, pp. 603-4 (1971). The application of the doctrine of balancing hardships or interests to the advantage of the defendant in McCann was unquestionably sound, because the plaintiff was suffering no harm whatever. (Syracuse Supply Co. v. Ry. Express Agency, Inc., 20 N.Y. (2d) 718, 229 N.E. (2d) 612, 283 N.Y.S. (2d) 44 (1967). But when the plaintiff is charging the defendant with nuisance because of his unreasonable alteration in the natural condition of a body of water - a charge which cannot be made good without proof that the plaintiff is suffering substantial harm (Torts Restat., sec. 822 & 849 (1939))-- the defendant will normally be unable to persuade the court to apply the doctrine in his favor, despite the fact that an injunction will cause him more harm than its denial would cause the plaintiff, unless the defendant is able to show that the importance to the public of the continuance of his activity outweighs the hardship which it is causing the plaintiff. Thus in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913) the defendant, who had been causing \$100 damage annually to the plaintiff - an amount which the court held to be substantial - by polluting a stream, was enjoined from continuing the pollution, despite the fact that the loss which would be caused the defendant by this decree would far exceed that which the plaintiff would suffer if injunctive relief were denied him. Although the defendant claimed that it would be inequitable to enjoin it in view of the small advantage to the plaintiff and the great loss to it which would result, and although it showed that its investment and payroll were large, there is no reference in the court's opinion to any attempt by the defendant to demonstrate that the cost of resort to another method of waste disposal would be so great as to force the defendant to cease operations and that the interest of the public in their continuance outweighed the plaintiff's interest in an unpolluted stream, and no intimation by the court that it was confronted with the question as to whether the injunction should be denied because the interest of the public outweighed that of the plaintiff. All of the court's language appeared to be with respect to a balance of the defendant's hardship against the plaintiff's; and the account of Whalen appearing in Boomer v. Atlantic Cement Co., 26 N.Y.(2d) 219, 257 N.E. (2d) 870, 309 N.Y.S. (2d) 312,315 (1970) seems to confirm this interpretation of the Whalen opinion. Whether the defendant in Whalen would have escaped injunctive restraint if it had elected to rely on the hardship it would cause the public rather than on the hardship to itself is a speculative matter. While the

fact that the defendant closed and never reopened its million dollar plant after the decision in *Whalen* (5 Powell on Real Prop. 344.5 (1968)) suggests that the defendant might have been able to convince the trial court that it could not continue to operate if forced to find an outlet for its waste other than the stream, and while the trial court might therefore have concluded that the consequent loss of 500 jobs would be contrary to the public interest, it is conceivable that the trial court might have arrived at the opposite conclusion if it were true as alleged by a former student of the author's whose parents lived in the vicinity at the time of the litigation that half of the community was opposed to the continued operation of the plant on one ground or another, and if evidence to that effect had been introduced. As to the relevance in this type of case of the desires of the people living nearby see *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62, 122 A. (2d) 233 (1956). The defendant also failed to escape injunctive restraint in *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549, 13 LNS 465 (1907) and in *Kennedy v. Moog Servocontrols, Inc.*, 21 N.Y. (2d) 966, 237 N.E. (2d) 356, 290 N.Y.S. (2d) 193 (1968) despite the size of its investment and payroll, apparently because there was no reason to suppose that the expense to suppose that the expense of compliance with the injunction would be so great that the defendant could not afford to continue operation, and therefore no reason to fear that the public interest would be jeopardized.

When, however, the defendant, because it has the power of eminent domain or is acting under special legislative authorization, is clearly able to make the showing which apparently was not attempted by the defendant in *Whalen*, injunctive relief against it is usually denied, even in nuisance cases in which it appears that the plaintiff is suffering much harm. (*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. (2d) 801 (1936); *Squaw Island Freight Terminal Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E. (2d) 10 (1937).) Furthermore defendants in nuisance cases who had neither the power of eminent domain nor special legislative authorization have escaped injunctive restraint when they have been able to show clearly that the public interest in defendant's continued operation is of greater importance than the plaintiff's need for injunctive relief by establishing that the defendant could not afford to continue operations if forced to abandon the practice complained of, and that the welfare of the community was dependent on continuance of the defendant's operations. (*Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904); *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich. 279, 215 N.W. 325 (1927); *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y. (2d) 219, 257 N.E. (2d) 870, 309 N.Y.S. (2d) 312 (1970). *Boomer* is also discussed in footnotes 491 and 548, post. It should be noted that in both groups of cases in which the defendant escapes injunctive restraint the hardship which the court balances against the plaintiff's is that of the public rather than that of the defendant, so that the court is not as open to criticism for favoring a wealthy and powerful individual or corporation at the expense of a poor man as it would be if the interests balanced were those of the plaintiff and the defendant. In view of the

foregoing and of the emphasis put by the court in *Boomer* on the part played by the public interest in cases from other jurisdictions in which the defendant escaped injunction it is difficult to accept as accurate the statement in the *Boomer* opinion that the denial of the injunction against the cement company by the courts below constituted "a departure from a rule that has become settled" (309 N.Y.S. (2d) at 316), apparently accepted as true in Note: Private Remedies for Water Pollution, 70 Col. L.R. 734,755 (1970), or the statement in Roberts, The Right to a Decent Environment, 55 Corn.L.R. 674,702 (1970) to the effect that *Boomer* had overruled *Whalen* and adopted the rule of *Madison*. It is submitted that these two cases have always been reconcilable because the former dealt solely with a competition between the interests of the plaintiff and defendant, whereas the latter involved a balance of the public interest against the plaintiff's hardship. Relevant in this connection is the comment on the equitable doctrine of balancing conveniences in Cribbet, Changing Concepts in the Law of Land Use, 50 Ia.L.R. 245, 270-2 (1965) which includes the statement that the number of cases in which a defendant guilty of nuisance has escaped injunctive restraint because of the importance of his activity to the public is "legion". See also 5 Powell on Real Prop. 344.5 (1968) approving decisions which prevent "the tremendous economic and social loss which follows the shutdown of a large industrial plant."

That it should be borne in mind, however, that the promotion of industrial growth and the creation of jobs are today only part of a public interest which is more broadly defined; and that the public has an interest not only in defendant's continued operation but in the manner of his operation see Note: 79 Yale L.R. 102,110 (1969). In *Boomer* the court apparently chose to leave the protection of the latter segment of the public interest to the Air Pollution Control Board established by Art. 12-A of the N.Y. Public Health Law. See 26 N.Y. (2d) at 233. As to the relevance of the public interest when a court is passing on the reasonableness of the defendant's activity in order to determine whether he is liable in damages even though not restrainable by injunction see pp. 97-111, post.

In the dissenting opinion in *Boomer* it was argued that the denial of the injunction by the majority violated the constitutional prohibition against the taking of property for a private use, even when compensation is given. (26 N.Y. (2d) at 231). It is submitted, however, that in cases in which injunctive relief is denied a plaintiff because of the paramount importance of the public interest, the taking which occurs--the destruction of the plaintiff's right to the equitable relief which would preserve the original physical condition of the land or water in which he has an interest--is for a public rather than for a private purpose or use, and that it is constitutionally permissible because the plaintiff receives compensation by an award of damages.

The application of the doctrine of balancing hardships or interests to the advantage of the defendant in *McCann* was unquestionably sound, because the plaintiff was suffering no harm whatever. But when the plaintiff is charging the defendant with nuisance because of his unreasonable alteration of the natural condition of a body of water - a charge

which cannot be made good without proof that plaintiff is suffering substantial harm (Torts Restat. secs. 822 & 849 (1939)) - the defendant will normally be unable to persuade the court to apply the doctrine in his favor, despite the fact that an injunction will cause him more harm than its denial would cause the plaintiff, unless the defendant is able to show that the continuance of his activity is clearly more important to the public in the long run than the continuance of the plaintiff's activity. Cf., for example, *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913) with *Squaw Island Freight Terminal Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E. (2d) 10 (1937).

- 90 - As supporting this interpretation of *McCann* see *Pica v. Cross County Construction Corp.*, 259 A.D. 128, 135; 18 N.Y.S. (2d) 470 (1949).
- 91 - That casting water upon or against, or covering the land of another with water without his consent is a trespass see Torts Restate. (2d), Illus. 3 & 5 to sec. 158 & Illus. 1 to sec. 161 (1965).
- 92 - See fn. 68, ante.
- 93 - In acc. with *McCann* on substantially similar facts see *Howland v. Union Bag & Paper Corp.* 156 Misc. 507, 282 N.Y.S. 375 (Sup.Ct., 1935).
- 94 - 238 N.Y. 109, 144 N.E. 359 (1924).
- 95 - 238 N.Y. 109, 115; 144 N.E. 359 (1924).
- 96 - See pp. 9-14, ante.
- 97 - See p. 9, ante.
- 98 - See p. 8, ante.
- 99 - The natural flow version, with its tendency to give the lowest owner a monopoly of the stream (*Dumont v. Kellogg*, 29 Mich., 420 (1874)), has been sharply criticized. "...the legal right of action of a riparian who has suffered no damage is an anachronism."--Bingham, *California Law of Riparian Rights*, 22 Cal.L.R. 251, 260 (1934). "...the natural flow theory...should be eliminated as the first step in any program for water law modernization."--Martz, *Water for Mushrooming Populations*, 62, W.Va. L.R. 1,10 (1959). In 1964 this version was characterized as "rigid, illogical and senseless" by Edward L. Ryan, then legal consultant to the N. Y. Temporary State Commission on Water Resources Planning. (See the 1964 report of that commission at pp. 140-1.) It has also been described as extremely wasteful. (Harnsberger, *Eminent Domain & Water Law*, 48 Neb.L.R. 325, 370 (1969).) The reasonable use version of the riparian doctrine under which harmless alterations in bodies of water are lawful and riparian owners with a dog-in-manger attitude cannot insist on waste of the water (*Haber & Bergen, Water Allocation in the Eastern U.S.* (chap by Haar & Gordon) 39 (1958)) is the one preferred by the American Law Institute (4 Torts Restat., chap. 41 (1939)), and is supported

by the weight of authority in states in which riparian rights are recognized (VI-A Amer.L.Prop. 163 (1954); Cribbet, Illinois Water Rights Law 4 (1958); 5 Powell on Real Prop., sec. 712 (1962); Waite, Beneficial Use of Water in a Riparian Jurisdiction, 1969 Wis.L.R. 864,878.) See also Powell at pp. 357 and 392 for criticism of the natural flow version on the ground that it makes it too easy for the first riparian user to acquire a prescriptive privilege, and so to hinder shifts in the water use pattern made advisable by changes in the relative economic and social values of the several water uses.

- 100 - Smith v. City of Rochester, fn. 47, ante; Neal v. City of Rochester, fn. 49, ante; N.Y. Rubber Co. v. Rothery, fn. 53, ante; Gilzinger v. Saugerties Water Co., fn. 55, ante; Amsterdam Knitting Co. v. Dean, fn. 56, ante; Mann v. Willey, fn. 57, ante.

- 101 - Note the belief expressed in Walsh on Equity 181 (1930) that the doctrine of the cases cited in fn. 100 represented settled New York law.

- 102 - Apparently there were in 1965 and still are other eastern states in which doubt as to the legality of harmless alterations exists because it cannot safely be assumed that the basic conflict between decisions that harmless alterations can be enjoined and decisions that harmful alterations are lawful, if reasonable will, in the absence of controlling legislation, be resolved in favor of parties wishing to make harmless uses. As indicating the existence of such a conflict and consequent uncertainty in other states, see Plumleigh v. Dawson, 6 Ill. 544 (1844) and Bliss v. Kennedy, 43 Ill. 67 (1867); Mayor & City Council of Baltimore v. Appold, 42 Md. 442 (1875) and Helfrich v. Catonsville Water Co., 74 Md. 269, 22 A. 72 (1891); Messinger's Appeal, 109 Pa. 285, 4 A. 162 (1885) and Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886). The Conn. Supreme Court recently required a city to pay for a diversion of water for municipal supply which was causing the plaintiff no harm, and which might never cause him any; and based its conclusion on the erroneous view (see p. 15, ante) that such action was necessary to protect the plaintiff against the acquisition of a prescriptive privilege by the city. (Dimock v. City of New London, 157 Conn. 9, 245 A. (2d) 569 (1968).) That it is still uncertain as to whether the Missouri courts would follow the natural flow or the reasonable use version of the riparian doctrine at the present time see J.D. Ellis, Modification of the Riparian Theory in Missouri, 34 Mo.L.R. 562,3,n.9 (1969).

- 103 - See p. 14, ante.

- 104 - See p. 15, ante.

- 105 - See Knauth v. Erie RR., 219 A.D. 83, 219 N.Y.S. 206 (1926), approved in Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671,685 (U.S. Dist. Ct., S.D.N.Y., 1968) without reference to the inconsistent New York authorities.

106 - It will be remembered that while the court in *McCann v. Chasm Power Co.* (fn. 84, ante.) suspended the injunction against the defendant's alteration of a stream until it should begin to cause harm, the court assumed that the harmless alteration could supply the foundation for a prescriptive privilege if suit were not brought to prevent that result; at least if the alteration involved a trespass. (See pp. 19-20, ante.) In *Messinger's Appeal* (fn. 102, ante.) it was held that a harmless non-trespassory alteration had initiated the growth of a prescriptive privilege which was good against a plaintiff who had failed to sue within 20 years of the beginning of the alteration, even though the harm which the alteration ultimately caused the plaintiff had not endured for 20 years. See also as to this hazard *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11, 14 (1922); VI-A Amer.L.Prop. 162 (1954) and 5 Powell on Real Prop. 356-7 (1962). The risk of loss from failure to sue for harmless withdrawals to which New York riparian owners were subject in 1965 due to the possibility that the New York courts might follow *Messinger* was not, of course, eliminated by the familiar rule enforced in *Penrhyn Slate Co. v. Granville Elec. Light & Power Co.*, 181 N.Y. 80, 73 N.E. 566 (1905) that the amount of water which can be taken after completion of the prescriptive period is limited by the amount withdrawn during that period. In the situation under consideration, as in *Messinger*, the question is not whether the prescriptive claimant can take more water than he withdrew during the prescriptive period, but whether he can continue to take the same amount that he withdrew during that period despite the fact that a diversion of that amount, although originally harmless, has become harmful to the plaintiff due to a decrease in the volume of the stream.

106a - This section, re-enacted as sec. 15-0107 of the Environmental Conservation Law, provides in subds. 1 and 2: "Person" means any individual, firm, co-partnership, association or corporation other than the state and a "public corporation". "Public corporation" means "public corporation" as defined in subdivision one of Section 3 of the General Corporation Law and includes all public authorities, except the Power Authority of New York State.

General Corporation Law, sec. 3, subds. 1-4: A "public corporation" includes a municipal corporation, a district corporation and a public benefit corporation. A "municipal corporation" includes a county, city, town, village and school district. A "district corporation" includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division. A "public benefit corporation" is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof.

- 107 - In *Kates*, Georgia Water Law 72 (1969) it is recommended that Georgia enact a statute which would, like sec. 15-0701, abolish a cause of action based on speculative future harm; provide for declaratory judgements as to water rights; and permit harmless use of lake or stream water on non-riparian land. Line 5 of subd. (1) expressly legalizes harmless non-riparian use. (see p. 23, ante.)
- 108 - This beneficial effect of sec. 15-0701 is noted in Harnsberger, *Eminent Domain & Water Law*, 48 Neb.L.R. 325,370 (1969).
- 109 - See p. 23-4, ante.
- 110 - See fns. 41 & 42, ante.
- 111 - Subd. (8) of sec. 15-0701 provides that it shall not affect the power of the State of New York or its governmental subdivisions to enjoin alterations in bodies of water--Comment on this subdivision appears at pp. 40-2, post.
- 112 - See pp. 9-14, ante.
- 113 - The term "foreign water" is used herein to denote water from a source not naturally tributary to the body of water to which it is added.
- 114 - See, for example, the dictum in *McCormick v. Horan*, 81 N.Y. 86 (1880) quoted at p. 91, post which was followed by the citation without critical comment of New Hampshire, New Jersey and Maryland cases taking the position that addition of foreign water to a stream is unlawful although causing no harm. As to the advisability of legislation legalizing harmful additions of foreign water when reasonable see pp. 91-7, post.
- 115 - Subd. (1) of sec. 15-0701 expressly legalizes a harmless alteration, even though it causes water to cover or permeate land previously dry. (See p. 23, ante.) Although this provision creates an exception to the common law rule that even harmless trespasses are enjoined under appropriate circumstances (See fn. 68, ante. and *McCann v. Chasm Power Co.* discussed at pp. 18-20, ante.), it poses no serious danger to the owner of the flooded land, since no substantial flooding is likely to be found harmless under the broad definition of harm found in subd. (2) of the section. (See p. 24, ante.) See also fn. 415, post.
- 116 - See the *Smith and Neal* cases cited at pp. 9-10, ante. While the subsequent decision in *McCann v. Chasm Power Co.* (See pp. 18-20, ante.) that an injunction against a harmless act could be suspended with leave to the plaintiff to apply for its reinstatement if and when the defendant's act began to cause him harm, might conceivably be construed as overruling *Smith and Neal* by implication, it is doubtful that *McCann* should or would be so interpreted, because the opinion in *McCann* made no reference to *Smith and Neal*, and gave no clear indication as to the court's views in regard to the particular problem involved in *Smith and Neal*.

- 117 - See p. 23, ante.
- 118 - Hutchins, Irrigation Water Rights in California (Circular 452 Revised, Calif. Agric. Exper. Station) 40 (1967); 1 Rogers & Nichols, Water for California, secs. 359, 404 & 441 (1967). As to the resemblance between the California rule and sec. 15-0701, see pp. 48-9, post.
- 119 - Hutchins, Irrigation Water Rights in California (Circular 452 Revised, Calif. Agric. Exper. Station) 40-1 (1967).
- 120 - 16 U.S.C., sec. 1001 et seq.; P.L. 566.
- 121 - Such a situation was believed to exist with respect to a proposed project for the augmentation and stabilization of the flow of Flint Creek in central New York. As to this project see the March, 1965 report of the Cornell Water Resources Center entitled "Profile of a Watershed: Flint Creek" and prepared for the N.Y. Temporary State Commission on Water Resources Planning at pp. 33-42, 84-85, and 122-123.
- 122 - See pp. 8-14, ante.
- 123 - See, for example, *Clinton v. Myers*, 46 N.Y. 511, 7 Am.Rep. 373 (1871) and the interpretation put upon it in *Seneca Consolidated Gold Mines v. Great Western Power Co.*, 209 Cal. 206, 287 P. 93 (1930).
- 124 - As to the sources of this uncertainty see p. 22-3, ante.
- 125 - See p. 25, ante.
- 126 - See p. 9, ante.
- 127 - See p. 8, ante.
- 128 - See fn. 14, ante.
- 129 - See p. 9-10 & fns. 47-50, ante.
- 130 - 141 ALR 633 (1942); 2 Nichols on Eminent Domain (3d ed.), sec. 5.795 (1950); R. W. Johnson, Riparian & Public Rights to Lakes & Streams, 35 Wash.L.R. 580, 610-611 fn. 141 (1960); Trelease, Legal Contributions to Water Resources Development, 9 (1966) - Univ. of Conn. Insitute of Water Resources, Report No. 2 (1967); Aycock, Introduction to Water Use Law in N. Car., 46 N.Car.L.R. 1,4,8 (1967); *Kennebunk etc Water Dist. v. Maine Turnpike Authority*, 145 Me. 35,71 A. (2d) 520,530 (1950).
- 131 - Nor does there appear to be any New York case in express accord; but the fact that in the New York judicial opinions requiring municipalities to give compensation for damage caused to lower riparians by diversion of

water for municipal supply no mention is made of the possibility that use for this purpose is a riparian use (see, for example, *Smith v. City of Brooklyn*, 160 N.Y. 357, 54 N.E. 787, 45 LRA 664 (1899); *Gray v. Village of Ft. Plain*, 105 A.D. 215, 94 N.Y.S. 698 (1905); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. (2d) 801 (1936); and *Rockland Light & Power Co. v. City of N.Y.*, 289 N.Y. 45, 43 N.E. 2d 803 (1942)) tends to support the assumption that New York would follow the prevailing view if the question were squarely presented to its courts. It is interesting to note that T. R. Lee, Counsel in Charge, Condemnation Division, Water Supply Section, N.Y. City Law Dept., has classified water use for municipal supply as non-riparian. (Acquisition of Riparian Rights in N.Y., 1964 Proceedings, Amer. Bar Assn., Sec. of Mineral & Natural Resources Law, 13,15,20).

- 132 - The fact that the opinions in *Smith* and *Neal* do not emphasize the non-riparian character of the defendant's use does not militate against this interpretation of these cases; for the opinions contain language broad enough to support a judgement for the plaintiffs, even if the defendant's use had been riparian. If a harmless riparian use is unlawful, a harmless non-riparian use would be so a fortiori in a riparian doctrine state.
- 133 - See p. 17-18 & fns. 75-78, ante.
- 134 - See p. 23.
- 135 - Marquis, *Freeman & Heath, Movement for New Water Rights Law*, 23 Tenn. L.R. 797,832 (1955); Cribbet, *Illinois Water Rights Law*, 28 (1958); Martz, *Water for Mushrooming Populations*, 62 W.Va.L.R. 1,11 (1959); O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549,577 (1962).
 "Perhaps no feature of riparian law has received more adverse and critical comment than the concept that the waters are reserved for the benefit of the lands along the stream, and that rights to the use of the water are special privileges of the owners of such lands."--Trelease, *Legal Contributions to Water Resources Development*, 9 (1966)--Univ. of Conn. Institute of Water Resources, Report No. 2 (1967). As tending to support the conclusion that the existing restrictions on non-riparian use should be relaxed see Haar & Gordon, *Riparian Water Rights vs. A Prior Appropriation System*, 38 Bost.Un.L.R. 207,240-1 (1958); Fox 1959 Proceedings, Section of Mineral & Natural Resources Law, Amer. Bar Assn. 22; Lee, *Acquisition of Riparian Rights in N.Y.*, 1964 Proceedings, Section of Mineral & Natural Resources Law, Amer. Bar Assn. 13,20; Davis, *Australian & Amer. Water Allocation Systems Compared*, 9 Bost.Coll.Ind. & Com'l L.R. 647,700 (1968); Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 S.Car.L.R. 757,769 (1969).
- 136 - There are two other views each of which appears to have attracted only

minority support: (1) that any non-riparian use which causes harm is unlawful, even though the harm would have been held reasonable and lawful if inflicted in the course of a use for the benefit of riparian land; and (2) that a non-riparian use is lawful, even though harmful, if reasonable under all the circumstances. For collections of authorities supporting the several views see 3 Tiffany on Real Prop. (3d ed.) 123 (1939); VI-A Amer.L.Prop. 162 & 164 (1954); 34 N.Car.L.R. 247 (1956); Trelease, Concept of Reasonable Beneficial Use, 12 Wyo.L.J. 1,2 (1957).

- 137 - In Lauer, Reflections on Riparianism, 35 Mo.L.R. 1,23 (1970) it is suggested that it might be desirable to enact legislation legalizing non-riparian use which does not cause actual damage by interfering with a riparian use.
- 138 - "The court appears to consider that the natural allocation of water between various watersheds ought not to be disturbed by the abstraction of water from one and its diversion to another. If this is the theory of the limitation-to-the-watershed rule, the rule is not applicable to all types of water cases. Uses of reasonable quantities of water for consumption would seem to be proper, whether made within the watershed or outside it. Permitting use outside the watershed may encourage uses which would not otherwise occur, but this does not seem blameworthy if the use is reasonable."--Haar & Gordon, Riparian Rights vs. A Prior Appropriation System, 38 Bost.Un.L.R. 207,240 (1958). As to the basis for discrimination against non-riparian use see also Tyler v. Wilkinson, 24 Fed. Cas. 472,4 (no. 14,312), 4 Mason 397 (1827); Lyon v. Wardens of the Fishmongers' Co., 1 App.Cas 662, 673-4,678,682 (1876); Williams v. Wadsworth, 51 Conn. 277,304 (1883); Com b to sec. 855, Torts Restat. (1939); Water Resources & the Law (Chap. by Lauer) 179-185 (1958) and The Constitutional Sanctity of a Property Interest in a Riparian Right, 1969 Wash. Un. L.Q. 327,337-8. "The obtaining of the maximum benefits of the use of water is a goal that is obviously not always reached by using it nearest its source."--Trelease, Legal Contributions to Water Resources Development, 9 (1966)--Univ. of Conn. Institute of Water Resources, Report No. 2 (1967). See also Martin, Water for New York, 104 (1960). See also authorities cited in fn. 677, post.
- 139 - See p. 25, ante.
- 140 - See p. 23, ante.
- 141 - See p. 16, ante.
- 142 - Should he be able to secure such an adjudication even though he cannot show the existing controversy which is prerequisite to obtaining a declaratory judgement under the general rule? (As to this requirement see Borchard on Declaratory Judgements (2d ed.) 42 (1941); Wardrop, Inc. v. Fairfield Gardens, 237 A.D. 605,262 N.Y.S. 95 (1933).) In Kates,

Georgia Water Law, 83 & 336 (1969) a statute is recommended for adoption in Georgia which expressly answers this question in the affirmative. Because in many water rights cases a declaratory judgment will have little value unless all of the riparian owners on the body of water involved are made parties to it, and because it may in many instances be difficult for the plaintiff to establish the existence of a controversy with them all, the original draft of sec. 15-0701 contained a provision with respect to the controversy requirement substantially similar to that recommended by Professor Kates. This provision was, however, deleted pursuant to the suggestion of Governor Rockefeller's counsel which may have been prompted by his belief that water cases are not so different from others as to require their exemption from the general rule as to the necessity of a controversy, and by his further belief that such a provision would be unable to survive attack on constitutional grounds.

- 143 - See p. 16, and fn. 64b.
- 144 - Since apportionment decrees may be rendered obsolete by changing circumstances (Davis, *Australian & American Water Allocation Systems Compared*, 9 *Bost.Coll.Ind. & Com'l L.R.* 647,676 (1968)), a court would hardly feel free to issue one which purported to violate the variability principle.
- 145 - The need for such legislation is discussed in Farnham, *Improvement of New York Water Law*, 3 *Land & Water L.R.* 377,410-411 (1968).
- 145a - In *Hackensack Water Co. v. Village of Nyack*, 289 *Fed.Supp.* 681 (1968) the plaintiff's prayer for a judgment declarative of its water rights was based on subd. 5.
- 146 - This rule is codified 162 in CPLR, sec. 203(a).
- 147 - *Pollack v. Josephy*, Misc. 238, 294 *N.Y.S.* 219 (Sup.Ct., 1937); *Hebrew Home for Orphans & Aged v. Freund*, 208 Misc. 658, 144 *N.Y.S.* (2d) 608 (Sup.Ct., 1955); *Ernst v. Ernst*, 40 Misc. (2d) 934, 243 *N.Y.S.* (2d) 917 (Sup.Ct., 1963).
- 148 - 2 *Carmody-Wait*, *Encyc. N.Y. Practice* (2d ed.) 340 (1965); *Kim v. Noyes*, 262 *A.D.* 581,584; 31 *N.Y.S.* (2d) 90 (1941); *Marsh v. Marsh*, 49 *N.Y.S.* (2d) 759 (Sup.Ct., 1944).
- 149 - *Jacobson v. Freedman & Slater, Inc.*, 275 *A.D.* 631, 92 *N.Y.S.* (2d) 333 (1949); *Kramer v. Bd. of Education*, 194 Misc. 128, 84 *N.Y.S.* (2d) 873 (1948); *affd. w.o.*, 275 *A.D.* 915, case 3, 90 *N.Y.S.* (2d) 684 (1949); *Schuman v. Schuman*, 137 *N.Y.S.* (2d) 485 (Sup.Ct., 1954).
- 150 - *Rock Hill Sewerage Disposal Corp. v. Town of Thompson*, 27 *A.D.* (2d) 626, No. 8; 276 *N.Y.S.* (2d) 188 (1966).
- 151 - See p. 26, ante.

- 152 - "There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations."--*Maguire v. Hibernia Savings & Loan Society*, 23 Cal. (2d) 719,734; 146 P. (2d) 673, 151 ALR 1062 (1944).
- 153 - See p. 31, ante.
- 154 - See p. 25, ante.
- 155 - See p. 34, ante.
- 156 - See fn. 148, ante.
- 157 - The first sentence of CPLR 3001 reads as follows: "The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to be a justiciable controversy whether or not further relief is or could be claimed."
- 158 - 22 Carmody-Wait, *Encyc. N.Y. Practice* 717-8 (1956); *Jacobson v. Freedman & Slater, Inc.*, 275 A.D. 631, 92 N.Y.S. (2d) 333 (1949); *Ernst vs. Ernst*, 40 Misc. (2d) 934, 243 N.Y.S. (2d) 917 (Sup.Ct.,1963).
- 159 - *Civ. Pract. Law & Rules*, sec. 214.
- 160 - See p. 26, ante.
- 161 - See p. 16 & fn. 64b, ante.
- 163 - See p. 26, ante.
- 164 - *509 Sixth Ave. Corp. v. N.Y.C. Transit Authority*, 15 N.Y. (2d) 48, 203 N.E. (2d) 486, 255 N.Y.S. (2d) 89, 12 ALR (2d) 1258 (1964). As to the law on this point in other jurisdictions, see 2 *Wood on Limitations* (4th ed.) 1408 (1916); *Dawson, Fraudulent Concealment and Statutes of Limitation*, 31 *Mich.L.R.* 875,896 (1933); 35 *Tex.L.R.* 145 (1956): and *Comment*: 11 *N.Y. Law Forum* 170 (1965) in which 509 Sixth Ave. is discussed.
- 165 - As to the possibility of such lateral permeation when the ground water level falls see *Harnsberger, Nebraska Ground Water Problems*, 42 *Neb.L.R.* 721,737 (1963); *San Bernardino Flood Control District v. Superior Court*, 75 *Cal.Rptr.* 24 (Cal.App., 1969).
- 166 - *Civ. Pract. Law & Rules*, sec. 214.
- 167 - As to the undesirability of extinguishing a cause of action before its owner has had a reasonable opportunity to know of its existence, see 2 *Powell on Real Prop.* 600-1 (1950); 35 *Tex.L.R.* 145 (1956); *Basque v. Yuk Lin Liao*, 441 P. (2d) 636 (Haw.Sup.Ct., 1968); *Diamond v. N.J. Bell Telephone Co.*, 51 N.J. 594,242 A.(2d) 622 (1968). In view of the general rule that a wrongful use cannot ripen into a prescriptive privilege unless the use is notorious (*Prop. Restat.*, sec. 458 & coms. h-k

(1944); 3 Tiffany on Real Prop. (3d ed.), sec. 1198 (1939); II Amer.L. Prop., sec. 8.56 (1952); 3 Powell on Real Prop. 486 (1952); Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich.L.R. 875, 896 (1933)), the enactment of subd. (7) was not necessary for the protection of riparian owners from the acquisition of prescriptive privileges against them by wrongful conduct of which they had had no reasonable opportunity to become aware.

168 - See p. 23, ante.

169 - Environmental Conservation Law, sec. 15-0701: (2) "Person" means any individual, firm, co-partnership, association or corporation other than the state and a "public corporation". (3) "Public corporation" means "public corporation" as defined in subdivision one of Section 3 of the General Corporation Law and includes all public authorities, except the Power Authority of New York State. General Corporation Law, sec. 3:1. A "Public corporation" includes a municipal corporation, a district corporation and a public benefit corporation. 2. A "municipal corporation" includes a county, city, town, village and school district...

170 - See p. 26, ante.

171 - See p. 7, ante.

172 - "It is for the lawmaking power to determine whether the amount of water proposed to be abstracted is so slight that it ought to be disregarded, and it is within the competency of the legislature to determine, as they have done in this act, that the diversion shall be absolutely prohibited. A similar question was presented in State Board of Health v. Diamond Mills Paper Co., 63 N.J.Eq. (18 Dick.) 111; affirmed, 64 N.J.Eq. (19 Dick.) 793. There a statute prohibited the discharge of polluting material into any stream from which municipalities receive a water-supply for domestic uses above their point of intake, and authorized the state board of health to institute an action in the court of chancery to enjoin the continuance of such pollution. It was contended that the pollution proved did not affect the water of the stream beyond a short distance from the point of pollution, and the proofs did not show that the water-supply of any municipality was in fact polluted. But Vice-Chancellor Stevens held, in effect, that in the face of the legislation the amount of pollution was immaterial. His decision was affirmed by this court for the reasons given by him."-- McCarter v. Hudson County Water Co., 70 N.J.Eq. 695, 720-1; 65 A. 489 (Err. & App., 1906); affd., 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908). See also cases cited in 32 ALR (3d) 215, 282-6 (1970).

173 - See p. 15, ante.

174 - Environmental Conservation Law, secs. 15-0501 to 15-0515.

- 175 - Sec. 71-1127 of the Environmental Conservation Law, applicable to the whole of Art. 15 of which the Stream Protection Law is part, contains the following provision: "Any person who violates any of the provisions of, or fails to perform any duty imposed by this article,...shall be liable to a penalty...for such violation...and, in addition thereto, such person may be enjoined from continuing such violation..."
- 176 - Thus Ia. Code Ann., sec. 455A.33 providing that the Iowa Natural Resources Council may enjoin the erection of an obstruction in a flood plain for which it has not granted a permit has apparently been construed as authorizing the issue of an injunction restraining the erection of such an obstruction, if no permit has been obtained for it, without proof that the obstruction will be harmful. (Ia. Nat.Res. Council v. Van Zee, 158 N.W. (2d) 111,5 (Ia.Sup.Ct., 1968).) On the other hand, it was held in this case and in Ia.Nat.Res. Council v. Mapes, 164 N.W.(2d) 177 (Ia.Sup.Ct., 1969) that the section did not authorize the issue of an injunction directing the removal of an obstruction erected without a permit, unless the Council proved that it constituted a nuisance.
- 177 - For examples of such treatment Title 15 of Art. 15 of the Environmental Conservation Law and art. II of the Public Health Law. The enactment of special rules applicable only in particular public water supply situations has not always worked to the advantage of the municipalities. Thus New York City has made persistent efforts to obtain legislation which would reduce the cost of its municipal water supply by relieving the city of its statutory liability for indirect real estate and business damages when taking riparian rights. (Lee, Acquisition of Riparian Rights in N.Y., 1964 Proceedings, Amer.Bar Assn., Section of Mineral & Natural Resources Law 13,21.) It could be argued, of course, that it is only fair that the city should remain subject to this liability, and that the legislation which should be enacted would extend it to all governmental bodies when exercising the power of eminent domain. As to insufficiency under existing law of compensation for property taken by eminent domain or for losses suffered by enforcement of the navigation servitude, see Cribbet, Changing Concepts in the Law of Land Use, 50 Ia.L.R. 245,276 (1965); Comment, Just Compensation & the Public Condemnee, 75 Yale L.J. 1053 (1966); Van Alstyne, Statutory Modification of Inverse Condemnation, 19 Stan.L.R. 727,767-8 (1967); Michelman, Property, Utility & Fairness: Ethical Foundations of "Just Compensation" Law, 80 Harv.L.R. 1165, 1254-8 (1967); Mayberry & Aloï, Compensation for Loss of Access in Eminent Domain in New York, 16 Buffalo L.R. 603,645 (1967); Netherton, Implementation of Land Use Policy, 3 Land & Water L.R. 33, 40 (1968); Rossi, The Public Right of Navigation & the Rule of No Compensation, 44 Notre Dame Lawyer 236, 247-251 (1968); Morreale-Hankes, Peace West of the 98th Meridian - A Solution to Federal-State Conflicts over Western Waters, 23 Rut.L.R. 23,43,58 (1968); Klein, Eminent Domain: Judicial Response to the Human Disruption, 46 Jour. of Urban Law 1 (1968); Gordnier, Eminent Domain: A Need for Policy Re-Consideration, 4 Land & Wat.L.R. 191 (1969); Licterman, An Evaluation

of the Rights & Remedies of a New York Landowner for Losses Due to Government Action, 33 Albany L.R. 537,555 (1969); Corker, Washington's Lake Chelan Decision, 45 Wash.L.R. 65,74 (1970). Even when costly, justice may be preferable to injustice in the long run.

- 178 - As to this situation see p. 50 et seq., post.
- 179 - For digests of and comments on these cases see pp. 8-14, ante.
- 180 - Art. I, sec. 6, N.Y. constitution; 14th Amendment to the federal constitution.
- 181 - United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N.Y. 38,46; 123 N.E. 200 (1919); Matter of Van Etten v. City of N.Y., 226 N.Y. 483,7; 124 N.E. 201 (1919); Matter of City of N.Y. (East River Drive), 264 A.D. 555,564-5; 35 N.Y.S. (2d) 990; affd. w.o., 298 N.Y. 843, 84 N.E. (2d) 148 (1942). For development of the thesis that only part of the privileges and rights comprised in the riparian interest are property see Water Resources & the Law (Chap. by Lauer) 166-211 (1958).
- 182 - Kratovil & Harrison, Eminent Domain - Policy & Concept, 42 Cal.L.R. 596,7 (1954); Chicago, Burlington & Quincy Rr. v. Chicago, 166 U.S. 226,235-7 & 241; 17 S.Ct. 581, 41 L.Ed. 979 (1896).
- 183 - The statute is set forth at pp. 23-6, ante.
- 184 - This approach was used in Spitler v. Town of Munster, 214 Ind. 75, 14 N.E. (2d) 579,115 ALR 1395 (1937) in Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222,232; 15 N.E. (2d) 587,117 ALR 1110 (1938); and in Dooley v. Town Plan & Zoning Comn., 151 Conn. 304, 197A. (2d) 770 (1964).
- 185 - Matter of City of N.Y. (East River Drive), 264 A.D. 555,564; 35 N.Y.S. (2d) 990 (1942); affd. w.o., 273 A.D. 884, case 3, 78 N.Y.S.(2d) 364 (1948); affd. w.o., 298 N.Y. 843, 84 N.E. (2d) 148 (1949); Bino v. City of Hurley, 273 Wis. 10, 76 N.W. (2d) 571 (1956); Kratovil & Harrison, Eminent Domain - Policy & Concept, 42 Cal.L.R. 596,601 & 608 (1954); 11 McQuillin, Munic. Corps. (3d ed.rev.), sec. 3226 (1964); Waite, Governmental Power & Private Property, 16 Cath.Un. of Amer.L.R. 283,292 (1967); Van Alstyne, Statutory Modification of Inverse Condemnation, 19 Stan.L.R. 727,770 (1967); Palmore, Damages Recoverable in a Partial Taking, 21 Southwestern L.J. 740 (1967); Netherton, Implementation of Land Use Policy, 3 Land & Water L.R. 33,9 (1968).
- 186 - Kratovil & Harrison, Eminent Domain - Policy & Concept, 42 Cal.L.R. 596, 608 (1954); 3 Stan.L.R. 361, fn. 5 (1951); 11 McQuillin, Munic. Corps. (3d ed.rev.), sec. 32.26 (1964); Peo. ex rel. Durham Realty Corp. v. La Fetra, 230 N.Y. 429,443; 132 N.E. (2d) 601, 16 ALR 152; app. dism., 257 U.S. 665,42 S.Ct. 47, 66 L.Ed. 424 (1921); O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. (2d) 61,119 P.(2d)

- 23 (1941); *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 291 P. (2d) 764,8 (1955); *New York State Thruway Authority v. Ashley Motor Court, Inc.*, 10 N.Y. (2d) 151,7; 176 N.E. (2d) 566, 218 N.Y.S. (2d) 640 (1961); *Moore v. Ward*, 377 S.W. (2d) 881, case 2 (Ky.Ct. of App., 1964); *Knight v. Grimes*, 80 S.Dak. 517, 127 N.W. (2d) 708 (1964); *Markham Advertising Co. v. State of Wash.*, 73 Wash. (2d) 451,439 P. (2d) 248 (1968) app. dismiss. for want of a substantial fed. question, 393 U.S. 316, 39 S.Ct. 553, 21 L.Ed. (2d) 512, retr. den., 393 U.S. 1112 (1969).
- 187 - See *Pa. Coal Co. v. Mahon*, 260 U.S. 393,415-6; 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 231; 15 N.E. (2d) 587, 117 ALR 1110 (1938).
- 188 - *Brown, Due Process of Law*, 40 Harv.L.R. 943,966 (1927); *Kratovil & Harrison, Eminent Domain - Policy & Concept*, 42 Cal.L.R. 596,609 (1954); *Dunham, A Legal & Economic Basis for City Planning*, 58 Col.L.R. 650,663-9 (1958); *Hochman, The Supreme Court & the Constitutionality of Retroactive Legislation*, 73 Harv.L.R. 692 (1960); *Sax, Takings & the Police Power*, 74 Yale L.J. 36,67 (1964); *Trelease, Policies for Water Law*, 5 Nat.Res.J. 1,35 (1965); *Michelman, Property, Utility & Fairness*, 80 Harv.L.R. 1165,1223,1233 (1967); *Van Alstyne, Statutory Modification of Inverse Condemnation*, 19 Stan.L.R. 727,761 (1967); *Hines, A Decade of Experience under the Iowa Water Permit System*, 8 Nat. Res. J. 23,43-5 (1968); *Netherton, Implementation of Land Use Policy*, 3 Land & Water L.R. 33,43 (1968); *Plager & Maloney, Emerging Patterns for Regulation of Consumptive Water Use in the Eastern U.S.*, 43 Ind.L.J. 383 (1968); *J.D. Ellis, Modification of the Riparian Theory and Due Process in Missouri*, 34 Mo.L.R. 562,571 (1969). *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Bacich v. Brd. of Control*, 23 Cal. (2d) 343,356; 144 P. (2d) 818,826 (1943); *Shepard v. Village of Skaneateles*, 300 N.Y. 115,118; 89 N.E. (2d) 619 (1949); *Vermont Woolen Corp. v. Ackerman*, 122 Vt. 219, 167 A. (2d) 533 (1961); *Moore v. Ward*, 377 S.W. (2d) 88, case 2 (Ky.Ct. of App., 1964); *Dooley v. Town Plan & Zoning Comm.*, 151 Conn. 304, 197 A.(2d) 770 (1964); *Grossman v. Baumgartner*, 17 N.Y. (2d) 345, 281 N.E. (2d) 259 (1966).
- 189 - For discussion of the value of several of the criteria which the courts have taken into account when determining whether or not a statute constitutes a valid exercise of the police power see *Harnsberger, Eminent Domain & Water Law*, 48 Neb.L.R. 325,342-354 (1969). At pp. 353-354 he says: "...the final determinations will ultimately depend, as they should, upon the value judgments of the judges rather than on any single formula which points to one choice over another ...the Court is not apt to adopt any fixed standard which would remove the factor of balancing the interests of the public against the harm to the individual in each situation..."
- 190 - As to the undefined limits of the police power see *Hudson County Water Co. v. McCarter*, 209 U.S. 349,355; 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Peo. ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429,443; 130 N.E. 601, 16 ALR 152; app.dismiss., 257 U.S. 665, 42 S.Ct. 47, 66 L.Ed. 424 (1921); *Village of Euclid v. Ambler*, 272 U.S. 365,387; 47 S.Ct.

114, 71 L.Ed. 303, 54 ALR 1016 (1926); *Berman v. Parker*, 348 U.S. 26, 32; 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Farley v. Graney*, 146 W.Va. 22, 119 S.E. (2d) 833, 843 (1960); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 4; 82 S.Ct. 987, 8 L.Ed. (2d) 130 (1962).

191 - See digests of *Townsend v. Bell*, *N.Y. Rubber Co. v. Rothery*, and *Amsterdam Knitting Co. v. Dean* at pp. 10-13, ante.

192 - 109 Pa. 285, 4 A. 162 (1885).

194 - In *Townsend v. Bell*, 62 Hun 306, 17 N.Y.S. 210 (Gen'l. Term, 1891) the plaintiff outbid the defendant at a sale of a riparian tract downstream from the defendant's, paying an inflated price for it, although he did not intend to use it himself, in the hope of forcing the defendant to rent it from him in order to escape liability for discharging discolored water into the stream from the riparian tract which defendant already owned. The plaintiff's suit for an injunction against such discharge was dismissed by the trial court. This judgement was, however, reversed on appeal by the General Term, that court holding in substance that defendant's discoloration of the water was unreasonable as a matter of law; and that the plaintiff was entitled to injunctive relief despite his inability to show present harm and despite the purpose for which he had acquired his riparian tract. If sec. 15-0701 of the Environmental Conservation Law had been in force, an affirmance of the trial court's judgment for the defendant would have been unavoidable because of the plaintiff's inability to show present harm. It is interesting to note that on a re-trial of the case the defendant's conduct was held to be reasonable and therefore lawful. The affirmance of this judgment by the Court of Appeals (167 N.Y. 462, 60 N.E. 757 (1901) - for further comment on this case see fn. 240 post) finally frustrated the plaintiff's attempt at extortion.

195 - See p. 16, ante.

196 - Where defendant's tort is causing plaintiff little or no harm, and plaintiff therefore has nothing substantial to gain from an injunction except the power to extort from the defendant an unreasonable price for a release of the plaintiff's right, the court is likely to refuse injunctive relief. (Plager, *Law of Water Allocation*, 1968 Wis.L.R. 673, 681-2; *Edwards V. Allouez Mining Co.*, 38 Mich. 46 (1878); *Johnson v. Killian*, 157 Fla. 754, 27 So. (2d) 345 (1946).) Holdings in accord with this tendency would seem to furnish analogical support for the conclusion that a statute which deprives a riparian owner of nothing except the power to extort an unreasonable price for the release of a power to sue although not harmed, is not unfair to the riparian owner and does not deprive him of an expectation worthy of legal protection. The New York cases involving the problem as to whether the law should aid an unharmed plaintiff seeking to extort an exorbitant settlement from a defendant are not easily reconcilable.

Compare the result reached in the earlier trial in *Townsend v. Bell*, commented on in fn. 194, with the stress which the court, when denying injunctive relief in *Haber v. Paramount Ice Corp.*, 239 A.D. 324, 267 N.Y.S. 349 (1933), affd., 264 N.Y. 98, 190 N.E. 163 (1934), put upon the probability that the plaintiff hoped by bringing his action to drive the defendant out of business or to compel it to buy peace on plaintiff's terms. However, in *McCann v. Chasm Power Co.*, 211 N.Y. 301, 105 N.E. 416 (1914) in which the court refused to enjoin a harmless but wrongful trespass caused by flooding, the court did not indulge in speculation as to the plaintiff's motives in seeking an injunction. (For previous comment on this case, see pp. 46,47,ante.) But even if the apparent conflict between *Townsend* and *Haber* were ultimately resolved in favor of the former, it seems unlikely that the private interest to which *Townsend* gave protection would be considered great enough to outweigh the public interest in the full use of water which is served by sec. 15-0701, and so to require the invalidation of that statute on constitutional grounds.

197 - See pp. 27-30, ante.

198 - See p. 45, ante.

199 - For analyses of the shortcomings of the various criteria see Kratovil & Harrison, *Eminent Domain - Policy & Concept*, 42 Cal.L.R. 596 (1954); Hochman, *The Supreme Court & the Constitutionality of Retroactive Legislation*, 73 Harv.L.R. 692 (1960); Dunham, *Griggs v. Allegheny County in Perspective*, 1962 Sup.Ct.Rev. 63; Sax, *Takings & the Police Power*, 74 Yale L.J. 36 (1964); Michelman, *Property, Utility & Fairness*, 80 Harv.L.R. 1165 (1967); Ratner, *Function of the Due Process Clause*, 116 Un.Pa.L.R. 1048, 1109-11 (1968).

200 - As to this situation see p. 50 et seq., post.

201 - Trelease, *Coordination of Riparian & Appropriative Rights*, 33 Tex.L.R. 24,37 (1954).

202 - See p. 21, ante.

203 - Trelease, *Coordination of Riparian & Appropriative Rights*, 33 Tex.L.R. 24,37 (1954).

204 - Trelease, *Coordination of Riparian & Appropriative Rights*, 33 Tex. L.R. 24,37 (1954).

205 - 217 Cal. 673, 22 P.(2d) 5 (1933).

206 - 217 Cal. 673, 705; 22 P.(2d) 5 (1933).

207 - "The amendment was designed primarily to destroy the right to object to the use of water not presently needed..." - *City of Los Angeles v. City of Glendale*, 23 Cal. (2d) 68, 142 P. (2d) 289,293 (1943).

- 208 - The fact that the decision in *Chow* was in regard to the validity of a constitutional provision rather than a statutory provision legalizing harmless uses should not prevent a party asserting the validity of the harmless alteration provision in sec. 15-0701 of the N.Y. Environmental Conservation Law from relying on *Chow* for support. Since a provision in a state constitution is as much subject to the federal constitution as is a state statute (*Fisk v. Jefferson Police Jury* 116 U.S. 131,5; 6 S.Ct. 329, 29 L.Ed. 587 (1885); *Texas Mex. Ry.Co. v. Locke*, 74 Tex. 370, 12 S.W. 80 (1889); *Bigelow v. Draper*, 6 N.Dak., 152,69 N.W. 570,3 (1896); *Matter of Tuthill*, 163 N.Y. 133,8; 57 N.E. 303 (1900); *Opinion of the Justices*, 234 Mass. 597, 607; 127 N.E. 525 (1920); and see in apparent accord concurring opinion of Stewart, J. in *Hughes v. State of Washington*, 389 U.S. 290, 88 S.Ct. 438,441; 19 L.Ed. (2d) 530 (1967)), a state statute should be subjected to no more stringent scrutiny than that to which a state constitutional provision is subjected when attacked as invalid under the 14th amendment to the federal constitution. It should be noted that the court when upholding the California constitutional provision in the *Chow* case did not rely on its being such rather than a statute, but on its constitutionality under the 14th amendment as a valid exercise of the state's police power. (22 P. (2d) at pp. 17-18.)
- 209 - Further support for the view that the legalization of harmless alterations in bodies of water by sec. 15-0701 constitutes a valid exercise of the state's police power is afforded by the decision of the U.S. Circuit Court of Appeals in *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.(2d) 555 (1934). In this case it appeared that the plaintiff owned riparian land on the east bank of a non-navigable stream and that the defendant owned riparian land on the west side opposite to plaintiff's; that under a permit from the state engineer, granted pursuant to an Oregon statute, the defendant had begun blasting in its half of the river bed to obtain a supply of stone and to improve the flow in the western half of the stream. Although the plaintiff had not yet made use of the stream for any purpose, it sought an injunction restraining defendant's activity on the ground that it would divert the water from the plaintiff's land on the east side of the stream and thus violate plaintiff's right that the natural condition of the stream should not be altered, and would interfere with its privilege of future use. The plaintiff contended that a statute purporting to empower the state engineer to authorize interference with the natural condition of the stream was unconstitutional as attempting to deprive plaintiff of its property without due process of law. The circuit court, nevertheless, affirmed the denial of an injunction by the trial court, pointing out (p. 562) that "riparian rights are subject to the police power of the state and within reasonable limits may be modified by legislation passed in the interest of the general welfare"; and held that Oregon had the ability to legalize by an exercise of the police power a presently harmless alteration in a body of water. Parties having occasion to assert the constitutionality of sec. 15-0701 cannot, however, rely very heavily on this case, for the force of its decision

as a precedent was considerably diminished by the treatment accorded it in the U.S. Supreme Court. (295 U.S. 142, 55 S.Ct. 725, 95 L.Ed. 1356 (1935).) That body, though affirming the decision of the circuit court, did so on the ground that the plaintiff, a successor to the recipient of a federal patent granted subsequent to the Desert Land Act of 1877 (43 USC, sec. 321), held no riparian rights, because the patent "carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed." (295 U.S. at p. 158.) The Supreme Court went on to point out that in view of this conclusion it was "passing without consideration" the question as to the validity of the Oregon legislation under the police power which would have been involved if the plaintiff had acquired riparian rights by succession to a federal patentee. (295 U.S. at p. 165.) This case is referred to again at p. 49, post, in connection with the question as to the constitutionality of proposed legislation legalizing harmful alterations in bodies of water, when the alterations are reasonable under all the circumstances.

- 210 - Tending to support the constitutional validity of sec. 15-0701 is *In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 140 N.W. (2d) 626 (1966) in which it was held that the due process clause of the Nebraska constitution was not violated by the enforcement of a statute which authorized the Nebraska Director of Water Resources to approve the withdrawal of percolating water from a tract of land for municipal supply although the ultimate source of most of the water was the river to which the tract was riparian, and even under the assumption that the natural flow version of the riparian doctrine prevailed in Nebraska at common law, because the evidence showed that the permitted withdrawals would not harm the riparian owners who were objecting to them and asserting the unconstitutionality of the statute.
- 211 - On the strength of the cases referred to at pp. 9-14, ante.
- 212 - See p. 44, ante.
- 213 - Listed at pp. 44-5, ante.
- 214 - *County of Los Angeles v. Superior Court of Los Angeles County*, 62 Cal. (2d) 839, 44 Cal. Rptr. 796; 402 P. (2d) 868, 871 (1965). *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 67 S.Ct. 271, 91 L.Ed. 296 (1946) is cited in *Fagnoli v. Murphy*, 33 A.D. (2d) 594, 304 N.Y.S. (2d) 504 (1969) in connection with the statement that "As a legislative creation, a statute of limitations may be withheld completely or, so long as existing causes of action are not extinguished, establish arbitrary time limits." There is, however, no language in the *Rothensies* opinion which supports the part of the quoted statement which indicates that a legislature lacks power to abolish an existing cause of action. Nor was that point in issue in *Fagnoli*.

- 215 - 228 U.S. 148, 33 S.Ct. 428, 57 L.Ed. 773 (1913).
- 216 - 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 347 (1921).
- 217 - Dunham, A Legal & Economic Basis for City Planning, 58 Col.L.R. 650, 663-9 (1958); Sax, Taking & the Police Power, 74 Yale L.J. 36,67 (1964); J. D. Ellis, Modification of the Riparian Theory & Due Process in Missouri, 34 Mo.L.R. 562,572 (1969); Trelease, Policies for Water, 5 Nat.Res. Jour. 1,35 (1965).
- 218 - Nor in the disappointment of any legitimate expectation of L's. See pp. 45 & 47, ante.
- 218a - See *Ridert v. Knox*, 148 Mass. 368,373-4, 19 N.E. 390, 2 LRA 81 (1889); *Camfield v. U.S.*, 167 U.S. 518,523-4, 17 S.Ct. 866, 42 L.Ed. 261 (1896); *Hathorn v. Natural Carbonic Gas Co.*, 194 N.Y. 326,343,349-50, 87 N.E. 504, 23 LNS 436 (1909); *Peo. v. N.Y. Carbonic Acid Gas Co.*, 196 N.Y. 421, 435, 90 N.E. 441 (1909) & *Nelson v. DeLong*, 213 Minn. 425, 7 N.W. (2d) 342, 8 (1942). See also authorities cited in fn. 217, ante & fn. 700, post.
- 219 - To the end that N.Y. law should not require waste of water. See p. 47, ante.
- 220 - See pp. 30-31, ante.
- 221 - An alteration in a body of water which is unreasonable as well as harmful is unlawful. (*George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 (1911).)
- 222 - See p. 15, ante.
- 223 - 4 *Tiffany on Real Prop.* (3d ed.) 502 (1939); *Scurlock*, *Retroactive Legislation Affecting Interests in Land*, 37 (1953); *Shriver v. Shriver*, 86 N.Y. 575,580 (1881) - dictum; *Campbell v. Holt*, 115 U.S. 620,3; 6 S.Ct. 209,29 L.Ed. 483 (1885); *Baker v. Oakwood*, 123 N.Y. 16,29; 25 N.E. 312, 10 LRA 387 (1890) - dictum; *Stewart v. Keyes*, 295 U.S. 403,417; 55 S.Ct. 807,79 L.Ed. 1507 (1935). While there appear to be no New York holdings in accord with the dicta in *Shriver* and *Baker*, and while there are several New York cases which have upheld legislation reviving a cause of action previously barred by a statute of limitation (see, for example, *Gallewski v. Hentz & Co.*, 301 N.Y. 164, 93 N.E. (2d) 620 (1950)), the author has found no case so holding which has involved the destruction by the legislature of an interest in land created by adverse possession or prescription. Statements tending to support the *Shriver* and *Baker* dicta appear in *Lightfoot v. Davis*, 198 N.Y. 261,4; 91 N.E. 582, 29 LNS 119 (1910).
- 224 - As to the relevance of the public interest and of the extent to which it will be served by a statute when determining whether or not the statute constitutes a valid exercise of the police power, see p. 45, ante and p. 148, post.

- 225 - Knauth v. Erie Rr. Co., 219 A.D. 83, 219 N.Y.S. 206 (1926).
- 226 - See p. 50, ante.
- 227 - See pp. 22-3 & 30, ante.
- 228 - See pp. 10, 11 & 13, ante.
- 229 - Knauth v. Erie Rr. Co., 219 A.D. 83, 219 N.Y.S. 206 (1926), approved in Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671, 685 (1968), a case in which the court took the correct position that a harmful alteration could not initiate a prescriptive privilege unless it was unreasonable and therefore unlawful.
- 230 - See p. 15, ante.
- 231 - See p. 5-6, ante.
- 232 - See pp. 1-5, ante.
- 233 - "So long, therefore, as a use of water is reasonable, the riparian proprietor making it is subject to no liability under the rule stated in this section even though it may cause some present, intentional and substantial harm to another." - Torts Restatement, com. i to sec. 851 (1939), which comment is based on the reasonable use version of the riparian doctrine. See 4 Torts Restatement, 346 (1939).
- 234 - 77 N.Y. 525,530 (1879).
- 235 - 113 A.D. 775,8; 99 N.Y.S. 365 (1906); affd.w.o., 189 N.Y. 531, 82 N.E. 1127 (1907).
- 236 - The infliction of substantial harm was also held lawful in Waffle v. N.Y. Central Rr. Co., 53 N.Y. 11 (1873). This was explained in Noonan v. City of Albany, 79 N.Y. 470 (1880) on the ground that the defendant's conduct was reasonable.
- 237 - 208 N.Y. 237,243; 101 N.E. 869 (1913).
- 238 - 47 A.D. 405,7; 62 N.Y.S. 444 (1900); affd., 169 N.Y. 577, 61 N.E. 1134 (1901).
- 239 - See pp. 9-14, ante.
- 240 - See p. 18, ante. Although it is conceivable that substantially harmful pollution of a body of water might be found to be reasonable and therefore lawful by a New York court under the doctrine of the Bullard and Henderson cases (see fn. 257, post), such an outcome would appear to be unlikely unless legislation clearly authorizing it is enacted. While in Townsend v. Bell, 167 N.Y. 462, 60 N.E. 757 (1901), Kyser v. N.Y.Cent. Rr. Co., 151 Misc. 226, 271 N.Y.S. 182 (Sup.Ct., 1934), and Michelson v. Leskowicz, 55 N.Y.S. (2d)

831 (Sup.Ct.), 270 A.D. 1042, 63 N.Y.S. (2d) 191 (1946) decisions were rendered in favor of defendant polluters, in no one of these cases did the plaintiff show that he had suffered substantial harm. Such language in the trial court's opinion in *George v. Village of Chester*, 59 Misc. 553, 111 N.Y.S. 722 (Sup.Ct., 1908) as might be interpreted as implying that substantially harmful pollution could be held lawful if found to be reasonable, was not referred to in the opinion of the Court of Appeals which, while taking the position that reasonable pollution is lawful, contained no statement inconsistent with the possibility that the court entertained the view that substantially harmful pollution is always unreasonable and therefore always unlawful.

241 - See p. 215, post.

242 - See pp. 146-153, post.

243 - See p. 45, ante.

244 - 1 *Cooley's Constitutional Limitations* (8th ed.) 191 (1927); *Dash v. Van Kleeck*, 7 Johns. 477,497; 5 Am.Dec. 291 (N.Y., 1811); *Salters v. Tobias*, 3 Paige Ch. 338,344 (N.Y., 1832); *Koshkonong v. Burton*, 104 U.S. 668, 27 L.Ed. 886 (1881); *Peo. ex rel McDonald v. Keeler*, 99 N.Y. 463,480; 2 N.E. 615 (1885); *Matter of City Housing Authority v. Muller*, 270 N.Y. 333,339; 1 N.E. (2d) 153, 105 ALR 905 (1936).

245 - 15 Conn. 366,375 (1843).

246 - 138 Conn. 205, 83 A.(2d) 177,183 (1951).

247 - 39 Conn. 576 (1873).

248 - 39 Conn. 576,583 (1873).

249 - The same question is raised by Connecticut decisions (See *Sisters of St. Joseph Corp. v. Atlas Sand, Gravel & Stone Co.*, 120 Conn. 168, 180 A. 303,6 (1935)) that the infliction of substantial harm by expediting and increasing the drainage of surface water into a stream is not actionable provided the surface water comes from within the stream's watershed and does not exceed the stream's carrying capacity.

250 - 43 Ill. 385 (1867).

251 - 232 Ill. 519, 83 N.E. 1048 (1908).

252 - 43 Ill. 67 (1867).

253 - *Mason v. Hoyle*, 56 Conn. 255, 14 A.786 (1888).

254 - 61 Ill.App. 593 (1895); *affd.*, 171 Ill. 350, 49 N.E. 497 (1898).

- 255 - See also *Bouris v. Largent*, 94 Ill.App. (2d) 251, 236 N.E. (2d) 15 (Ill. App., 1968) which could easily be interpreted as supporting the position taken in *Bliss and Howell*.
- 256 - 195 Mass. 591, 81 N.E. 468 (1907).
- 257 - 195 Mass. 591, 81 N.E. 468,9 (1907). While this position has been taken in other jurisdictions (*Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 A. 72 (1891); *George v. Village of Chester*, 59 Misc. 553, 111 N.Y.S. 722 affd. on op. below, 137 A.D. 889, 121 N.Y.S. 1131, affd. as to this point, 202 N.Y. 398, 95 N.E. 767 (1911); *Montgomery Limestone Co. v. Bearden*, 256 Ala. 269, 54 So. (2d) 571,4 (1951); *Botton v. State*, 69 Wash. (2d) 751, 420 P. (2d) 352,9 (1966)), the question as to how much agricultural pollution can be held reasonable under present conditions may prove to be difficult. See fn. 240 ante. As to the acceleration in the aging of New York's Lake Onondaga caused by agricultural runoff see 2 Water Control News No. 16, p. 1 (9/5/67). As to the need for restrictions on agricultural practices resulting in pollution see 2 Water Control News, No. 10, pp. 8-9 (7/24/67) calling attention to the interim report of the National Technical Advisory Committee on Water Quality Criteria. According to Hines, *Agriculture: The Unseen Foe in the War on Pollution*, 55 Conn.L.R. 740 (1970) agricultural wastes receive practically no attention under the new state standards submitted under the federal Water Quality Act of 1965. For assertions that a riparian owner has the privilege of polluting a body of water to a reasonable degree, assuming no valid statutory prohibition, see 2 Nichols on Eminent Domain (3d ed.) 225 (1963); 11 McQuillin on Munic. Corps. (3d ed. rev.), sec. 31.27 (1964). Note: 79 Yale L.J. 102,3 (1969). Contra: Lewis, *The Phantom of Federal Liability for Pollution Abatement in Condemnation Actions*, 17 Mercer L.R. 364,370-2 & 378 (1966). That the cases on the point are in an "unsatisfactory snarl", see Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 Buf.L.R. 448,454-5 (1961). Among the numerous cases recognizing a common law privilege of pollution to a reasonable degree are *Snow v. Parsons*, 28 Vt. 459 (1856); *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 A. 72 (1891); *Peo. ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 221, 40 P. 531 (1895); *Petition of Clinton Water Dist. of Island County*, 36 Wn.(2d) 284, 218 P. (2d) 309, 312 (1950). The following New York cases also take this position: *Townsend v. Bell*, 167 N.Y. 462, 60 N.E. 757 (1901); *George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 (1911); *Michelson v. Leskowitz*, 55 N.Y.S. (2d) 831 (Sup.Ct.), affd., 270 A.D. 1042, 63 N.Y.S. (2d) 191 (1946). Whether the courts which decided *Matter of Town of Waterford v. Water Pollution Control Brd.*, 5 N.Y. (2d) 171, 156 N.E. (2d) 427, 182 N.Y.S. (2d) 785 (1959) and *Application of City of Johnstown*, 12 A.D. (2d) 218, 209 N.Y.S. (2d) 982, leave to app. to Ct. of App.den., 9 N.Y. (2d) 613, 176 N.E. (2d) 407,217 N.Y.S. (2d) 1025 (1961) intended to overrule *Townsend*, *George* and *Michelson* and several other New York cases in accord with them, or whether they looked upon them as distinguishable is not clear. A leading New York case recognizing the

the privilege to withdraw water to a reasonable extent, even though the withdrawal causes harm is *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 320; 58 N.E. 142 (1900). Although in *Hanks, Law of Water in New Jersey*, 22 Rutgers L.R. 621 (1968) *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62, 122 A. (2d) 233 (1956) is interpreted at 682 as adopting the rule of reasonable use for controversies involving the pollution of watercourses, attention is drawn to the tenor of the court's statement in regard to the cases dealing with raw sewage; a statement which tends to raise a doubt as to whether substantially harmful pollution could ever be held to be reasonable in New Jersey. Moreover, although in South Carolina a riparian owner appears to have a privilege of polluting a body of water to a reasonable extent, there is basis for the assumption that substantially harmful pollution would be unreasonable as a matter of law in that state. Thus in *U.S. v. 531.13 Acres of Land*, 366 F.(2d) 915 (1966), cert.den. sub.nom. *Duke Power Co. v. U.S.* 385 U.S. 1025, No. 777, 87 S.Ct. 742, 17 L.Ed. (2d) 673 (1967) the conclusion was drawn from the South Carolina cases that pollution which was not injurious to fish, livestock or irrigation and which was "probably inconsequential to swimmers" would be illegal at common law against a riparian owner who had adapted his land to recreational uses. As to the uncertainty in regard to the legality of pollution in Wisconsin at common law, see *Kusler, Water Quality Protection for Inland Lakes*, 1970 Wis. L.R. 35, 55-9 (No. 8).

- 258 - 195 Mass. 591, 81 N.E. 468, 470 (1907). See also *Elliott v. Fitchburg Rr. Co.*, 64 Mass. 191, 6 (1852) to the effect that if defendant's use causes substantial damage to plaintiff, an action can be maintained.
- 259 - 13 Gray 443, 452-3 (Mass., 1859).
- 260 - See p. 56, ante.
- 261 - See p. 58, ante.
- 262 - While the court said in substance in *Sturtevant v. Ford*, 280 Mass. 303, 7-8; 182 N.E. 560 (1932) that the rules governing harmful power uses are applicable to other uses, the statement is not so phrased as to make it clear that the court meant it to apply to other uses if they were substantially harmful.
- 263 - 78 N.Car. 156, 9 (1878).
- 264 - 153 N.Car. 542, 69 S.E. 623 (1910).
- 265 - 129 N.Car. 93, 39 S.E. 729 (1901).
- 266 - See pp. 58-9, ante.
- 267 - *Hoy v. Sterrett*, 2 Watts 327, 331-2 (Pa., 1834); *Hetrick v. Deachler*, 6 Pa. 32 (1847); *Hartzall v. Sill*, 12 Pa. 248 (1849); *Whaler v. Ahl*, 29 Pa. 98 (1857).

- 268 - See p. 58, ante.
- 269 - See pp. 59-60, ante.
- 270 - See pp. 55-6, ante.
- 271 - 112 Pa. 34,41; 3 A. 780 (1886).
- 272 - 113 Pa. 126, 6 A. 453 (1886).
- 273 - *City of Valparaiso v. Hagen*, 159 Ind. 337, 54 N.E. 1062, 48 LRA 707 (1899) in holding that the substantially harmful discharge of sewage into a stream by the defendant city was reasonable and lawful, relied in part on the general proposition that a substantially harmful use could be reasonable and lawful.
- 274 - Moreover, it is difficult to decide what position on the question in hand has been taken by the South Carolina courts. See the cases cited by Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 S.Car. L.R. 757 (1969) at pp. 760, 762-3 & 765-6, and the interpretation of South Carolina law found in *U.S. v. 531.13 Acres of Land*, 366 F.(2d) 915 (1966), cert.den.sub nom. *Duke Power Co. v. U.S.*, 385 U.S. 1025, No. 777, 87 S.Ct. 742, 17 L.Ed. (2d) 673 (1967).
- 275 - Among the descriptions of state water law which are silent or not explicit on the point are the following: Cribbet, *Illinois Water Rights Law* (1958); *Water Resources & the Law* (Chap. on Mich. water law by King, Lauer & Ziegler) 423 (1958); Haber & Bergen, *Water Allocation in the Eastern U.S.* (Chap. on Mass water law by Haar & Gordon) 1, (Chap. on N.Car. water law by H. H. Ellis) 189, (Chap. on Mich. water law by Arens & Haber) 377 (1958); Mann, Ellis & Krausz, *Water Use Law in Illinois* (1964); Galbreath, *Maryland Water Law* (1965); Mann, McLarney, Angle & Miller, *Water-Use Law in Missouri* (1965); Aycock, *Water Use Law in North Carolina*, 46 N.Car.L.R. 1 (1967); *Proceedings of Water Resources Colloquium*, Penn. State Univ. (Paper of Pa. Water Law by Dall) 1 (1967); Reis, *Connecticut Water Law* (1967); & Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 S.Car.L.R. 757 (1969). While it can be inferred from Morreale Hanks, *Law of Water in New Jersey*, 22 Rutgers L.R. 621,651-5 (1968) that New Jersey follows the reasonable use version of the riparian doctrine so far as to legalize harmful alterations in lakes or streams for benefit of riparian land, provided the harm is not substantial, it can also be inferred from that article and from the cases cited in it that a substantially harmful alteration in such bodies of water would be unreasonable as a matter of law in New Jersey. The article, however, contains no definite statement on that point. Although it is said in Maloney, Plager & Baldwin, *Water Law & Administration - The Florida Experience*, 165 (1968) that the Florida courts "would probably adopt the reasonable use aspect of the riparian doctrine and permit diversions that did not unreasonably interfere with uses by other riparian owners," this cannot, of course, be taken as a statement of settled law but only as a prediction that the Florida courts, when faced

with the question, would hold that a substantially harmful alteration in a lake or stream is lawful if reasonable. However, in *Kates*, Georgia Water Law, 64 (1969) it is said: "The tenor of the relatively few Georgia cases dealing with the problems seems to be, with one possible exception that any material injury caused by alteration of the natural flow, is unreasonable."

- 276 - In one western state in which both appropriative and riparian rights are recognized, it has been held that substantial harm can lawfully be inflicted on an existing riparian use by a subsequent appropriator when such harm is reasonable because the plaintiff's riparian use was not (*Joslin v. Marin Munic. Water Dist.*, 67 Cal. (2d) 132, 60 Cal. Rptr. 377, 429 P.(2d) 889 (1967)); and in another it has been held that in such a situation the liability of the appropriator is to be determined by applying the test of reasonableness. (*Wasserman v. Coffee*, 80 Neb. 149, 141 N.W.(2d) 138 (1966).)
- 277 - See fn. 233, ante.
- 278 - *Kinyon*, What Can a Riparian Proprietor Do?, 21 Minn.L.R. 512, 525 (1937); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. (2d) 174 (1944).
- 279 - *Meyers v. Lafayette Club*, 197 Minn. 241, 266 N.W. 861 (1936).
- 280 - *Johnson v. Seifert*, 257 Minn. 159, 100 N.W. (2d) 689 (1960).
- 281 - *Lake Gibson Land Co. v. Lester*, 102 So(2d) 833, (Fla.Ct.of App., 1958).
- 282 - In none of the lake level cases cited in fn. 43 ante, did the court manifest such awareness.
- 283 - That the restraint which the plaintiff seeks to impose on the defendant's activity must, like the plaintiff's own activity, be reasonable see *City of N.Y. v. Blum*, 208 N.Y. 237, 242; 101 N.E. 869 (1913). Relevant in this connection is the following comment on *Dunlap v. N. Carolina Power & Light Co.*, 212 N.Car. 814, 195 S.E. 43 (1938) appearing in *Tarlock*, *Preservation of Scenic Rivers*, 55 Ky.L.J. 745, 752-3 (1967): "...plaintiff, a riparian who used a stream for fishing, alleged that defendant's construction of a dam and hydroelectric generating facility upstream 'deprives him of the pleasure and profit in pursuit of fishing and other ordinary uses of said water and results in material injury to the banks of the stream.' The injury was caused by the substitution of the normal flow pattern with a fluctuating pattern created by defendant's generator. The court held that the doctrine of reasonable use applied and that defendant's use was not unreasonable. The court reasoned that if plaintiff is guaranteed a right to the natural flow, it 'would mean that a stream not theretofore used for water power purposes could never be so used, because the person who first undertook to avail himself of the water power capabilities of the stream would find that he was not making reasonable use thereof as to other owners.' Courts will

probably follow Dunlap, since recognition of such a sweeping right to a constant flow would frustrate upstream development. However, the case should not be interpreted as prohibiting recognition of rights to the free-flow for recreational purposes. A better approach would be for courts to recognize that the use of the stream for recreational purposes is reasonable and that the recreational user is entitled to a proportionate share of the stream in times of shortage but is not entitled to a preference over other users."

- 284 - See the New York cases apparently decided on the basis of the natural flow version of the riparian doctrine cited ante at pp. 9-14. See also the interpretation put upon *Bohannon v. Camden Bend Drainage Dist.*, 240 Mo. App. 492, 208 S.W. (2d) 794 (1948) in *Wood v. South River Drainage Dist.*, 422 S.W. (2d) 33, 8 (Mo. Sup. Ct., 1967).
- 285 - Thus under the natural flow version a consumptive use by the defendant might be held illegal in order to keep a body of water in its natural condition at the behest of the plaintiff, although the maintenance of that condition would be of little moment to him and although the public interest would be better served by the defendant's activity than by the preservation of the status quo. See *Tarlock, Preservation of Scenic Rivers*, 55 Ky.L.J. 745, 749, 750 (1967).
- 286 - See, for example, *Gillett v. Johnson*, 30 Conn. 180, 3 (1861); *Dardenne Realty Co. v. Abeken*, 232 Mo. App. 945, 106 S.W. (2d) 966 (1937).
- 287 - As in *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713 (1903) and in accordance with the other authorities cited in fn. 708, post. For critical comment on *Harris v. Brooks*, 229 Ark. 435, 283 S.W. (2d) 129, 54 ALR (2d) 1440 (1955) in which the court cast all the loss on a consumptive user in order to protect a non-consumptive user by refusing to permit the lowering of a lake level, and without discussing the possibility of requiring the non-consumptive user to put up with a reasonable amount of inconvenience resulting from a small decrease in lake level in order that the consumptive user might have at least part of the water he needed see *Tarlock, Preservation of Scenic Rivers*, 55 Ky.L.J. 745, 751 (1967).
- 288 - That sharing in times of shortage can involve substantial harm to all the parties because the losses caused by the shortage as well as the benefits derived from what supply is available are shared see p. 59, ante.
- 289 - The adoption of such a rule would be of considerable assistance to obstructive plaintiffs by enabling them to prepare their cases at relatively small expense; for the only issue to be tried would be as to the substantiality of the harm which the alteration had caused or would cause them.
- 290 - See *Farnham, Improvement of New York Water Law*, 3 Land & Water L.R. 377, 405-411 (1968).

- 291 - See pp. 215-6, post.
- 292 - Torts Restat., com. h to sec. 853 (1939); 3 Tiffany on Real Prop. (3d ed.) 417 (1939); VI-A Amer.L.Prop. 159 (1954). But it should be borne in mind that while priority in time is not of itself decisive as between two competing claimants for water, it is one of the factors which is taken into account when passing upon the reasonableness of the competing uses. See com. g to sec. 853, Torts Restat.; Strobel v. Kerr Salt Co., 164 N.Y. 303,315; 58 N.E. 142 (1900). For the statement that the weight given to the priority factor in riparian doctrine states is greater than is generally supposed, See Beuscher, Appropriation Water Law Elements in Riparian Doctrine States, 10 Buf.L.R. 448,451,453 (1961).
- 293 - See authorities cited in fn. 64a, ante.
- 293a - See authorities cited in fn. 64b, ante.
- 293b - Clinton v. Myers, 46 N.Y. 511,6; 7 Am.Rep. 373 (1871); Prentice v. Geiger, 74 N.Y. 341,5; (1878); Gehlen v. Knorr, 101 Ia. 700, 70 N.W. 757,9 (1897); United Paper Board Co. v Iroquois Pulp & Paper Co., 226 N.Y. 38,45; 123 N.E. 200 (1919); Dunlap v. Carolina Power & Light Company, 212 N.Car. 814,20; 195 S.E. 43 (1937). Concerning this equality of right the Torts Restatement says at p. 350 of vol IV (1939): "All have equal rights, but this does not mean that each is entitled, under all circumstances, to make the same uses or do the same things as the others. Equality of right means only that each riparian proprietor is entitled to a reasonable use of the water, and to the same legal protection in such use as is accorded every other riparian proprietor..."
- 294 - As to the undesirability of rigidity and the desirability of flexibility in the water use pattern see Trelease, A Model State Water Code for River Basin Development, 22 Law & Contemporary Problems 301, 314 (1957); Cribbet, Illinois Water Rights Law 45 (1958); Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Haar & Gordon) 38 (1958); Trelease, Policies for Water Law, 5 Nat.Res.J. 1,30 (1965); Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water, 43 Ind.L.J. 383,403 (1968). Relevant in this connection are the provisions in the permit statutes of several eastern states which either place time limits on the duration of water use permits or even go so far as to make permits revocable at any time. As in Iowa a water use permit may not endure for more than ten years without renewal (Ia. Code, sec. 455A.20), and may be cancelled to protect the public interest or to prevent injury to person or property, the status of the permittee is "little more than a mere tenant at will of the use" according to Hines, A Decade of Experience under the Ia. Water Permit System, 7 Nat.Res.J. 499,547 (1967). Minn. Stat.Ann., sec. 105.44 (g) still provides that permits are subject to cancellation at any time if necessary to protect the public interest despite the statement of the

Minn. Water Resources Brd. in its 1963 report on water law study at pp. 48-9 that Minn. water use permits are insecure. The second sentence of the ambiguous provision in Miss. Code Ann., sec. 5956-05 that "No water appropriation acquired pursuant to law shall be declared forfeited and surrendered except by a court of competent jurisdiction as other property rights are determined. Provided however, upon good cause shown, the board may modify or terminate any appropriation at any time," points toward uncertainty in the duration of permits; the degree of uncertainty depending upon the construction which the courts put upon the phrase, "upon good cause shown". See also Ark.Stat.Ann., sec. 21-1306; Mich.Stat.Ann., sec. 3.533(22) and 13.145(1); 58 N.J.Stat.Ann., sec. 1-44; Gen.Stat.N.Car., sec. 143-215.16 (Sess.L.1967, c.933, s.6); Wis.Stat.Ann., Sec. 30.18.

- 295 - Torts Restat., sec. 852 & comments (1939).
- 296 - Torts Restat., secs. 853 & 854 & comments (1939).
- 297 - Barnard v. Sherly, 135 Ind. 547, 24 LRA 568 (1893).
- 298 - As in Michelson v. Leskowicz, 55 N.Y.S. (2d) 831 (Sup.Ct., 1945); affd., 270 A.D. 1042, 63 N.Y.S. (2d) 191 (1946).
- 299 - As in Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886) in which the decision for the defendant was based in part on the availability to the plaintiff of a satisfactory alternative water supply (see p. 149, Official Report); and as in City of N.Y. v. Blum, 208 N.Y. 237, 101 N.E. 869 (1913). For a dictum indicating the relevance of the plaintiff's ability to avoid the harm see Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F. 200, 4; cert.den., 238 U.S. 630, 35 S.Ct. 793, 59 L.Ed. 1497 (1915).
- 300 - As in Henderson Estate Co. v. Carroll Elec. Co., 113 A.D. 775, 8; 99 N.Y.S. 365 (1906); affd.w.o., 189 N.Y. 531, 82 N.E. 1127 (1907).
- 301 - Smith, Reasonable Use as a Defense, 17 Col.L.R. 383, 9 (1917); Booth v. Rome. W. & O. Term. Rr. Co., 140 N.Y. 267, 274-5; 35 N.E. 592, 24 LRA 105 (1893); Henderson Estate Co. v. Carroll Elec. Co., 113 A.D. 775, 8; 99 N.Y.S. 365 (1906); affd.w.o., 189 N.Y. 531, 82 N.E. 1127 (1907); Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.(2d) 357 (Fla.Ct.ofApp., 1959); cert.den.w.o., 117 So.(2d) 842 (Fla.Sup.Ct., 1960).
- 302 - A plaintiff cannot establish the existence in himself of a cause of action against a defendant merely by showing that the defendant has caused him harm. Unless the defendant violated some legal interest of the plaintiff when causing the harm, it is *damnum absque injuria* and not actionable. (Booth v. Rome, W.&O.Term Rr. Co., 140 N.Y. 267, 273, 35 N.E. 592, 24 LRA 105 (1893); Whitmore v. Brown 102 Me. 47, 65 A.516, 520-1 (1906) and Dimock v. New London, 157 Conn. 9, 245 A.(2d) 569, 572, 42 ALR (3d) 417 (1968).)

- 303 - N.Y. Pub. Health L., Arts. 11 & 12.
- 304 - N.Y. Conservation L., Art. 5, Part III-A.
- 305 - See sec. 429-o set forth at pp. 220-1, post.
- 306 - As in *Michelson v. Leskowitz*, 55 N.Y.S. (2d) 831 (Sup.Ct., 1945); *affd.*, 270 A.D. 1042, 63 N.Y.S. (2d) 191 (1946).
- 307 - For the text of this bill see pp. 215-221, post.
- 308 - 83 N.Y. 400,6 (1881).
- 309 - 38 Hun 612 (1886); *affd.w.o.*, 104 N.Y. 674 (1887).
- 310 - 156 N.Y. 213, 50 N.E. 803 (1898).
- 311 - See also *Smith v. City of Brooklyn*, 160 N.Y. 357,360; 54 N.E. 787, 45 LRA 664 (1899) in which in support of a holding that the defendant was liable for harm caused by reduction of stream flow effected by sinking wells which intercepted percolating water tributary to the stream the court said: "...no one may divert, or obstruct, the natural flow of a stream for his own benefit, to the injury of another."
- 312 - 164 N.Y. 303, 320; 58 N.E. 142 (1900).
- 313 - The uncertainty of the meaning of "diversion" in water cases is regretfully noted in 5 Powell on Real Prop. 367 (1968).
- 314 - As to this case see fn. 311, ante.
- 315 - See pp. 31-2, ante.
- 316 - *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y., 1816); *Gray v. Village of Ft. Plain*, 105 A.D. 215, 94 N.Y.S. 698 (1905); *Matter of Van Etten v. City of N.Y.*, 226 N.Y. 483, 124 N.E. 201 (1919); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. (2d) 801 (1936); *Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 43 N.E. (2d) 803 (1942). See also fn. 131, ante.
- 317 - That even if use for municipal supply be treated as a riparian use, such use is not a reasonable exercise of a riparian privilege, see *Harding v. Stamford Water Co.*, 41 Conn. 87 (1874); *Dimock v. City of New London*, 157 Conn. 9, 245 A.(2d) 569 (1968); *Okla. Water Resources Bd. v. Central Okla. Master Conservancy Dist.*, 464 P. (2d) 748, 755, 40 Okla Bar Assn. J. 556 (Okla Sup.Ct., 1969) and *Wisdom, Law of Rivers* 77 (1962).
- 318 - 83 N.Y. 400, 6 (1881).
- 319 - 164 N.Y. 303, 315; 58 N.E. 142 (1900).
- 320 - 164 N.Y. 303, 323, 58 N.E. 142 (1900).

- 321 - The following statement in the opinion in *Bronxville Palmer, Ltd. v. State of N.Y.*, 33 A.D. (2d) 412,4, 308 N.Y.S. (2d) 758, 760 (1970) tends to support the view apparently taken in these three cases rather than that for which Strobel might possibly stand. "None of the claimants were riparian owners and, accordingly, their theory of absolute liability on the part of the State because of interference with the flow of natural streams is without merit." The reasonable implication is that if the claimants had been riparian owners the interference would have been unreasonable as a matter of law.
- 322 - Thus a New York administrative body with jurisdiction in part of the water field has asserted that the provision in the Harmful Use Bill which would legalize harmful diversions of water when reasonable (see pp. 79-82, post) would effect a change in the existing New York common law, and statements in the recent case of *Hackensack Water Co. v. Village of Nyack*, 289 F.Supp. 671, 677-8 (1968) could conceivably be interpreted as expressing this view, except as to diversions for domestic use.
- 323 - *Harding v. Stamford Water Co.*, 41 Conn. 87 (1874); *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 A.265 (1899); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.(2d) 177 (1951); *Collens v. New Canaan Water Co.*, 155 Conn. 477,234 A.(2d) 825 (1967). This result, which is arrived at in most jurisdictions (Trelease, *Legal Contributions to Water Resources Development*, Univ. of Conn. Institute of Water Resources, Report No. 2, at 9 (1967)), was in *Harding* based on the conclusion that use for municipal supply is not a reasonable exercise of a riparian privilege. See also fn. 317, ante. In some jurisdictions it is based on the ruling that use for municipal supply is not a riparian use. (Aycock, *Introduction to Water Use Law in N.Car.*, 46 N.Car.L.R. 1,4,8 (1967).) It has been held that diversion for municipal supply is not a valid exercise of the police power. (*City of Los Angeles v. Aitken*, 10 Cal.App.(2d) 460, 52 P. (2d) 585,590,592 (1935).)
- 324 - Decided in the Conn. Super. Ct. in 1783.
- 325 - 1 Root 535 (Conn. Super. Ct., 1793).
- 325a - 30 Conn. 180 (1861).
- 326 - 3 Tiffany on Real Prop. (3d ed.), sec. 724 (1939); VI-A Amer.L. Prop., sec. 28.57 (1954); 5 Powell on Real Prop. 359 (1968).
"...the right to consume...for...domestic uses...taking precedence of any right below." - *Williams v. Wadsworth*, 51 Conn. 277,304 (1883).
- 327 - That irrigation to further the production of crops for sale is an artificial use, see 3 Tiffany on Real Prop. (3d ed.) 121;VI-A Amer.L. Prop. 165 (1954); Trelease, *Concept of Reasonable Beneficial Use*, 12 Wyo.L.J. 1,3 (1957).

- 328 - Uses for commercial or manufacturing enterprises are artificial. (See authorities cited in fn. 327, ante.) It would seem to follow that use for the production of power to service such enterprises would be classified as artificial.
- 329 - 155 Conn. 477, 234 A.(2d) 825 (1967). The court said at p. 831 of the Atlantic Reporter: "It is immaterial in what manner the diversion of the stream by the defendant is effected. Diversion or diminution of the natural flow of a surface stream to the detriment of the riparian owners...is an interference with the rights of the riparian owners..."
- 330 - While it has been pointed out that the right of a riparian to make "reasonable diversions" for irrigation, provided they do not involve "undue injury" to lower owners, has been established in Connecticut (Reis, Conn. Water Law, 44 (1967)), this statement seems to fall somewhat short of an assertion that a substantially harmful diversion for irrigation would be lawful in Connecticut, if reasonable.
- 331 - Cribbet, Illinois Water Rights Law, 19 (1958).
- 332 - Mann, Ellis & Krausz, Water-Use Law in Illinois, 33 (1964).
- 333 - Evans v. Merriweather, 4 Ill. 492 (1842); Plumleigh v. Dawson, 6 Ill. 544 (1844); Canal Trustees v. Haven, 11 Ill. 554 (1850).
- 334 - See Blanchard v. Baker, 8 Me. 253, 266 (1832); p. 70, ante and pp. 73-5, post.
- 335 - But it could be inferred from the statement in Leitch v. Sanitary Dist. of Chicago, 369 Ill. 469, 473; 17 N.E. (2d) 34 (1938) - "it cannot lawfully be diverted, increased, diminished or polluted" - that in Illinois the term "diversion" does not include mere diminution in flow.
- 336 - See pp. 58-9, ante.
- 337 - Stowell v. Lincoln, 77 Mass. (11 Gray) 434 (1858); Elliot v. Fitchburg Rr. Co., 64 Mass. 191 (1852) - furnishing support for this proposition by implication.
- 338 - Cook v. Hull, 20 Mass. (3 Pick.) 269 (1825).
- 339 - Weston v. Alden, 8 Mass. 136 (1811); Elliot v. Fitchburg Rr. Co., 64 Mass. 191 (1852); Lund v. City of New Bedford, 121 Mass. 286 (1876); Peck v. Clark, 142 Mass. 436, 441; 8 N.E. 335 (1886); Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913).
- 340 - 8 Mass. 136 (1811).

- 341 - 20 Mass. (3 Pick.) 269 (1825).
- 342 - 13 Mass. 420 (1816).
- 343 - Under the law of prescription now generally prevailing, however, it would be impossible for a downstream owner to acquire a prescriptive right against an upstream owner to the amount of water he had been taking during the alleged prescriptive period, because his taking would not have given the upstream owner a cause of action by prosecuting which he could have protected himself against the prescriptive claim. In brief, prescription does not run upstream, except in cases in which the downstream owner by the erection of a dam causes an upper owner's land to be flooded, or in analogous cases. (4 Tiffany on Real Prop. (3d ed.) 555 & 575 (1939); VI-A Amer.L.Prop. 161 (1954); 5 Powell on Real Prop. 399 (1968); Trelease, Coordination of Riparian and Appropriative Rights, 33 Tex.L.R. 24,48 (1954); Harnsberger, Prescriptive Water Rights in Wisconsin, 1961 Wis.L.R. 47, 59-60; Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1903); Holmes v. Nay, 186 Cal. 231, 199 P. 325 (1921); Preston v. Clark, 238 Mich. 632, 214 N.W. 226, 53 ALR 194, 201 (1927); Dana S. Courtney v. Quinnehtuk Co., 303 Mass. 48, 52; 20 N.E. (2d) 399 (1939); Kennebunk Water Dist. v. Me. Turnpike Authority, 147 Me. 149, 84 A. (2d) 433 (1951); Harrell v. City of Conway, 224 Ark. 100, 271 S.W. (2d) 924,8 (1954); U.S. v. Fallbrook Public Utility District, 347 F. (2d) 48,57 (1965).)
- 344 - 64 Mass. 191,3 (1852).
- 345 - 121 Mass. 286 (1876).
- 346 - As to other grounds on which harmful withdrawals of water for municipal supply have been held unlawful see fn. 323 ante.
- 347 - 142 Mass. 436, 441; 8 N.E. 335 (1886).
- 348 - 212 N.Car. 814, 195 S.E. 43, 6 (1937).
- 348a - See, for example, Mizell v. McGowan, 129 N.Car. 93,39 S.E. 729 (1901).
- 349 - 212 N.Car. 814, 195 S.E. 43,6 (1937).
- 350 - 264 N.Car. 643, 142 S.E. (2d) 653,7 (1965).
- 351 - Haber & Bergen, Law of Water Allocation in the Eastern U.S. (chap. by H. H. Ellis), 204 (1958). This chapter includes a thoughtful and helpful analysis of the North Carolina cases with respect to the legality of diversion.
- 352 - Apparently consistent with this conclusion is the statement: "Under existing laws (the reference is to those of North Carolina) the use of water for irrigation could become a fertile field for litigation." - Aycock, Introduction to Water Use Law in N.Car., 46 N.Car.L.R. 1,8 (1967).

- 353 - These reasons are stated at pp. 66-8, ante.
- 354 - As in *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 315 & 320; 58 N.E. 142 (1900); *Sherrill v. North Carolina State Highway Commission*, 264 N.Car. 643, 142 S.E. (2d) 653, 7 (1965). As to the importance of irrigation in North Carolina see Univ. of Nor.Car. Water Resource Papers Nos. 2 through 11 (1963) and Nos. 14 & 19 (1966).
- 355 - Mann, Ellis & Krausz, *Water-Use Law in Illinois*, 33 (1964).
- 356 - In the leading case of *Dumont v. Kellogg*, 29 Mich. 420 (1874) the court remarked that the case before it differed essentially from one in which a stream had been diverted from its natural course and turned away from a proprietor below, and added that such a diversion would be a wholly wrongful act for which an action would lie without proof of actual damage. It is conceivable that the court might have been led to take this position by the feeling (though it did not express it) which might have been justified in 1874 that a diversion of water by a change in the course of a stream would create a substantially permanent situation which would be from a practical standpoint irreversible.
- 357 - For authorities establishing the existence of this principle as part of the reasonable use version of the riparian doctrine see fn. 64b, ante.
- 358 - For the protection of the public interest a state should have provisions in its statutes forbidding changes in the location or course of bodies of water without a permit from a designated administrative body. See, for example, N.Y. Environmental Conservation Law, sec. 15-0501.
- 358a - As it has been decided that a permit issued by a governmental agency does not legalize what would otherwise be a violation of a common law riparian right (*Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. (2d) 801 (1936); *Squaw Island Freight Terminal Co. v. City of Buffalo*, 273 N.Y. 119, 7 N.E. (2d) 10 (1937); *N.J. v City of N.Y.*, 283 U.S. 473, 482; 51 S.Ct. 519, 75 L.Ed. 1176 (1931); *Botton v. State*, 69 Wn.(2d) 751, 420 P. (2d) 352, 8 (1966); *Joslin v. Marin Munic. Wat. Dist.*, 67 Cal.(2d) 132, 60 Cal.Rptr. 377, 429 P. (2d) 889, 891 (1967); *Hackensack Water Co. v. Village of Nyack*, 284 F. Supp. 671, 683 (1968); *Sperry Rand Corp. v. Water Resources Comm.*, 30 A.D. (2d) 276, 291 N.Y.S. (2d) 716 (1968); lv. to app.den., 24 N.Y. (2d) 737 (1969)), (see also p. 110 & fn. 541, post), it would seem to follow that such a permit would not legalize a violation of a statutory riparian right if the statute creating the right does not provide that it shall be subject to such a hazard.
- 359 - See p. 16, ante.

- 360 - It might be advisable to amend subd. (5) of sec. 15-0701 of the N.Y. Environmental Conservation Law by adding a provision authorizing the court to require the posting of a restoration bond by a party planning to change the location or course of a lake or stream, even though a court sitting in equity would probably have this power apart from statute, in view of the well established doctrine that an equity court may mold its decree to fit the exigencies of the case before it.
- 361 - *Niagara Falls Power Co. v. Duryea*, 185 Misc. 696, 57 N.Y.S. (2d) 777 (Sup.Ct., 1945). For a digest of and quotations from this case see pp. 180-3, post.
- 362 - *State of New York v. System Properties, Inc.*, 2 N.Y. (2d) 330, 141 N.E. (2d) 429, 160 N.Y.S. (2d) 859 (1953). For a digest of and quotations from this case see pp. 179-180 & 183-4, post.
- 363 - See *Minneapolis Mill Co. v. Brd. of Water Comrs.*, 56 Minn. 485, 58 N.W. 33 (1894); *affd. Sub Nom., St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U.S. 349, 18 S.Ct. 157, 42 L.Ed. 497 (1897) in which the Minnesota court denied the claim of the plaintiff riparian owner for damages resulting from the withdrawal by the defendant city of water from a navigable river for public supply. The court asserted that the public was privileged to divert water from a navigable stream for public uses, including municipal supply, without compensating the riparian owners for harm caused by such diversion. The U.S. Supreme Court affirmed on the ground that the plaintiff's rights as riparian owner were measured by the Minnesota law; and that as there were no previous Minnesota decisions to the contrary, the Minnesota court's declaration of the law in the case before it was controlling. As to the extent to which there has been favorable reaction in Michigan to the Minnesota view see *Haber & Bergen, Water Allocation in the Eastern U.S.* (chap. by Fisher) 414 & 475 (1958); and *Loranger v. City of Flint*, 185 Mich. 454, 152 N.W. 251 (1915).
- 364 - See the quotation from *Hackensack Water Co. v. Village of Nyack*, 289 F.Supp. 671 (U.S. Dist. Ct., S.D.N.Y., 1968) in fn. 913, post.
- 365 - See p. 134, post.
- 366 - See pp. 208-9, post.
- 367 - In such a case the diversion could not be justified under New York State's sovereign power, because it does not extend to lakes or streams the beds of which are privately owned. See pp. 211-214, post.
- 368 - *Davis, Australian & American Water Allocation Systems Compared*, 9 Bost.Coll.Ind. & Coml. L.R. 647,687 (1968).
- 369 - See authorities cited in fn. 130, ante.

- 370 - See fn. 131, ante.
- 371 - See 3 Tiffany on Real Prop. (3d ed.) 123 (1939); VI-A Amer. L.Prop. 162,4 (1954); 34 N.Car.L.R. 247 (1956).
- 372 - Garwood v. N.Y.C. & H.R.Rr.Co., 83 N.Y. 400,38 Am.Rep. 452 (1881); Knauth v. Erie Rr. Co., 219 A.D. 83, 219 N.Y.S. 266 (1926).
- 373 - Harding v. Stamford Water Co., 41 Conn. 87 (1874); Dimock v. City of New London, 157 Conn. 9, 245 A.(2d) 569 (1968); Okla Water Resources Board v. Central Okla. Master Conservancy Dist., 40 Ok. Bar Assn. J. 556 (Ok.Sup.Ct., 1969). "...the ultimate question under the law of riparian rights is whether the use modifying the flow of water is reasonable, not whether it is in the public interest. The difference becomes immediately apparent when considering the use of water for a municipal water supply. Such use might often be deemed in the public interest. Nevertheless, the great majority of courts have concluded use for a municipal water supply to be improper."--Waite, Beneficial Use of Water in a Riparian Jurisdiction, 1969 Wis.L.R. 864,878. It will be noted, however, that Waite does not say that the public interest is irrelevant when determining reasonableness. And it should be borne in mind that when determining what is in the public interest in the long run, a court might well conclude that fairness to investors in riparian land is more important to the public than obtaining a municipal water supply without paying for it. See also authorities cited in fns. 375, 491 & 529, post.
- 374 - See pp. 31 & 70 & fns. 131, 316 & 317, ante.
- 375 - See Kratovil & Harrison, Eminent Domain - Policy & Concept, 42 Cal.L.R. 596 (1954); Mayberry & Aloï, Compensation for Loss of Access in Eminent Domain, 16 Buffalo L.R. 603, 647-8 (1967) taking the position that the public should be expected to bear the cost of any improvement it makes, through the sovereign, for its own benefit, and that the police power should not be exercised to pauperize; Kates, Georgia Water Law, 68 (1968) stating that "the economic burden of a change for the benefit of the public should not be assumed by a few people"; Licterman, Rights & Remedies of a New York Landowner for Losses Due to Governmental Action, 33 Albany L.R. 537,551-2 (1969); U.S. v. Willow River Power Co., 324 U.S. 499, 502, 65 S.Ct. 761, 89 L.Ed. 1101 (1945); Albers v. County of Los Angeles, 62 Cal.(2d) 250, 42 Cal.Rptr. 89,96-7; 329 P. (2d) 129 (1965) and Forbell v. City of N.Y. 164 N.Y. 522,7; 58 N.E. 644, 51 LRA 695 (1900) which held that abstraction of underground water for municipal supply was unreasonable. Analogical support for this position is afforded by the last reason given for the decision in Armstrong v. Francis Corporation, 20 N.J. 320, 120 A.(2d) 4, 10; 59 ALR(2d) 413 (1956). See also the authorities cited in fns. 491 & 529, post.
- 376 - City of Los Angeles v. Aitken, 10 Cal.App. (2d) 460,52 P.(2d) 585, 590,592 (1935).

- 377 - Dunham, A Legal & Economic Basis for City Planning, 58 Col.L.R. 650,633-9 (1958); Sax, Takings & the Police Power, 74 Yale L.J. 36,67 (1964); Trelease, Policies for Water, 5 Nat.Res.J. 1,35 (1965).
- 378 - See cases cited in fn. 316, ante.
- 379 - See pp. 220-1, post.
- 380 - Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1,39 (1959).
- 381 - 282 U.S. 660,9; 51 S.Ct. 286, 75 L.Ed. 602 (1931).
- 382 - 320 U.S. 383,93; 64 S.Ct. 176, 88 L.Ed. 116 (1934).
- 383 - 283 U.S. 336,343; 51 S.Ct. 478, 75 L.Ed. 1104 (1931).
- 384 - See fn. 322, ante.
- 385 - See also Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (1968) from which it appears that the New York village is presently claiming a privilege to divert an amount of water from the Hackensack River under a permit from the N.Y. Water Resources Commission which the plaintiff water company alleges will leave a supply insufficient to satisfy the public needs in two New Jersey counties.
- 386 - See p. 220, post.
- 387 - All harmless alterations, regardless of type, have already been legalized by subd. (1) of sec. 15-0701 of the New York Environmental Conservation Law. (See pp. 23-4, ante.)
- 388 - As apparently reaching the conclusion that in New Jersey substantially harmful diversions are unreasonable as a matter of law see Morreale Hanks, Law of Water in New Jersey, 22 Rutgers L.R. 621,638,657,622-4 (1968).
- 389 - Although it is said in Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453,6 (1886) that a riparian owner may use stream water for irrigation to a reasonable degree, Messinger's Appeal, 109 Pa. 285, 4 A. 162 (1885) which the court in Pa. Coal cited in support of this statement, and Citizens' Electric Co. v. Susquehanna Boom Co., 270 Pa. 525, 113 A.559, 562 (1921) show that withdrawal of water for consumptive uses such as in steam boilers or for irrigation is unreasonable as a matter of law in Pennsylvania if it is causing or if it may in the future cause material harm, despite the liberality shown in that state toward substantially harmful detention for power generation (see pp. 61-2, ante), which in hot, dry weather may be a consumptive use because of evaporation, though it is not usually classified as such.

- 390 - As to the debateability of this assumption see pp. 55-7, ante.
- 391 - Bullard v. Saratoga Victory Mfg. Co., 77 N.Y. 525 (1879).
- 392 - 46 N.Y. 511, 7 Am.Rep. 373 (1871). This case was so interpreted in Seneca Consolidated Gold Mines Co. v. Great Western Power Co., 209 Cal.App. 206, 287 P. 93 (1930).
- 393 - 46 N.Y. 511, 520; 7 Am.Rep. 373 (1871). The "aqua currit" maxim is usually translated as requiring that water be allowed to flow as it has been accustomed to flow.
- 394 - 46 N.Y. 511, 520; 7 Am.Rep. 373 (1871).
- 395 - 164 N.Y. 303, 323; 58 N.E. 142 (1900).
- 396 - 164 N.Y. 303, 321; 58 N.E. 142 (1900).
- 397 - 238 N.Y. 109, 115-6; 144 N.E. 359 (1924).
- 398 - Proceedings Penn. State Water Resources Colloquium (paper by H.H. Ellis), 26 (1967). See also Ellis' paper in 5 Water for Peace 652 (1967).
- 399 - Reis, Conn. Water Law (1967).
- 400 - Aycock, Introduction to Water Use Law in N.Car., 46 N.Car.L.R. 1 (1967).
- 401 - Proceedings Penn. State Water Resources Colloquium (paper by Dall), 1 (1967). Indeed he goes so far as to say at p. 9 that except with respect to domestic uses, the Pennsylvania case law "has been built into a monumental ambiguity".
- 402 - Kendall, Water Law: Streamflow Rights in New England (1967).
- 403 - Cribbet, Illinois Water Rights Law, 30, 37, 51 (1958).
- 404 - 70 Mich. 610, 38 N.W. 649 (1888).
- 405 - Water Resources & the Law (chap. by Lauer, King & Ziegler), 440-1 (1958).
- 406 - See fn. 233, ante.
- 407 - 29 Pa. 98 (1857).
- 408 - 13 Gray 444 (Mass., 1859).
- 409 - 46 N.Y. 511, Am.Rep. 373 (1871). As to this case see p. 84, ante.
- 410 - 4 Gray 370, 376-7 (Mass., 1855).

- 411 - 193 Mass. 52, 159-160; 78 N.E. 881 (1906).
- 412 - As to the uncertainty with regard to the legality in New Jersey of substantially harmful impoundment see Morreale Hanks, Law of Water in N.J., 22 Rutgers L.R. 621, 656, 663, 667 (1968).
- 413 - See pp. 68-83, ante.
- 414 - 3 Tiffany on Real Prop. (3d ed.) 137 (1939); VI-A Amer.L.Prop. 6, fn. 21 (1954); Gerrish v. Clough, 48 N.H. 9, 2 Am.Rep. 165 (1868); McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914); De Vore Farms, Inc. v. Butler Hunting Club, Inc., 225 Ark. 818, 286 S.W. (2d) 491 (1956); Collins v. Wickland, 251 Minn. 419, 88 N.W. (2d) 83 (1958).
- 415 - Even though harmless flooding constitutes a trespass (McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914)), harmless flooding is not likely to occur under such circumstances that it would impair the landowner's feeling of security in the possession of his land, the desire to nurture which is one of the principal justifications for the general rule that even harmless intrusions are actionable trespasses. (See Torts Restat. (2d), sec. 163 (1965).) See also fn. 115, ante.
- 416 - See p. 23, ante.
- 417 - See p. 221, post.
- 418 - Illus. 5 to sec. 158, Torts Restat. (2d) (1965); McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914).
- 419 - Pfeiffer v. Grossman, 15 Ill. 53 (1853).
- 420 - Morreale, The Navigation Power & the Rule of No Compensation, 3 Nat.Res.J. 1,46 (1963); Lewis, The Phantom of Federal Liability, 17 Mercer L.R. 364,377 (1966); U.S. v. Willow River Power Co., 324 U.S. 499,509; 65 S.Ct. 761, 89 L.Ed. 1101 (1945); U.S. v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S.Ct. 885, 9; 94 L.Ed. 1277 (1950).
- 421 - If Clinton v. Myers, 46 N.Y. 511, 7 Am.Rep. 373 (1871), commented upon at p. 84, ante, stands for the proposition, as it appears to do, that a riparian owner can enjoin a streamflow stabilizing dam because he wants to enjoy a continuation of the freshets which enabled him to run his mill full tilt in the spring rather than at a more even rate throughout the year, regardless of the reasonableness of the activity of each of the litigants in the light of the activity of the other, it would seem advisable to overrule that decision by legislation.
- 422 - 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1950).

- 423 - 67 Cal. (2d) 132, 60 Cal.Rptr. 377, 429 P. (2d) 889 (1967).
- 424 - See also *Kistler v. Watson*, 79 Oh.L.Abst. 552, 156 N.E. (2d) 833 (1957) in which an impoundment was held unlawful because unreasonable in view of the small advantage derived from it by the impounder and the substantial harm inflicted by it on a lower riparian owner.
- 425 - See authorities cited in fns. 371 & 372, ante & 669, post.
- 426 - See fns. 317 & 373 & p. 79, ante.
- 427 - As to this principle see p. 16, ante.
- 428 - Perhaps this is why the California court did not include the variability principle in the bases for its decision, despite the fact that it is well established in California. See the authorities cited in fn. 64b, ante.
- 429 - As to this minority rule see p. 140, post.
- 430 - As in sec. 429-o of the N.Y. Harmful Use Bill. (See pp. 220-1, post.)
- 431 - VI-A Amer.L.Prop. 170 & 175 (1954); Trelease, Coordination of Riparian and Appropriative Rights, 33 Tex. L.R. 24,6 (1954); Hutchins, Irrigation Water Rights in California 29 (1967).
- 432 - It has been suggested in substance that the decision for the defendant in *Joslin* could have been put on the ground that the plaintiff was asserting a riparian right to accretions rather than a right to the use of the water, and that his accretion right was not broad enough to include future accretions. (*Malakoff, Erosion of a Water Right*, 5 Cal.West.L.R. 44, 73 (1968).) This would not seem to be possible in all jurisdictions, however. See Beck, Governmental Refilling of Lakes & Ponds, 46 Tex.L.R. 180,183-191 (1967) showing a division of authority on the point; *Freeland v. Pa.Rr.*, 197 Pa. 529, 47 A. 745 (1901) holding that the loss of future alluvion was properly taken into account in a condemnation damage award; and *Tallassee Power C. v. Clark*, 77 F. (2d) 601 (1935) holding in accord with the dictum in *St. Clair County v. Lovington*, 90 U.S. (23 Wall.) 46, 68; 23 L.Ed. 59 (1874) that the riparian right to future alluvion is a vested right, and that whether the defendant power company could be held liable because its dam prevented the deposit on plaintiff's riparian land of stream-borne sediment and silt, which had occurred annually prior to the dam's erection, depended on whether the defendant's use or control of the water was reasonable.
- 433 - See pp. 76-7, ante.
- 434 - See pp. 77-9, ante.

- 435 - Western Resources Conference Papers, 47 & 232 (1959); Saturday Review (article by Stegner), p. 29 (Oct. 23, 1965).
- 436 - Exploration of underground storage capacity before going too far with surface reservoirs was urged by R.C. Heath, U.S. Geological Service, in an address before the Empire State Chapter of the Soil Conservation Society Feb. 3, 1967.
- 437 - McGuinness, Water for the U.S., 2 Nat.Res.J. 187,199 (1962) - "If variable streams are to meet demands which themselves are variable and are likely to be greatest when natural flow is least, there is only one answer - storage." N.Y. Conservation Law, sec. 437, subd. (12) directs that the regional planning and development boards provided for in that section shall give "particular consideration... to the impounding and retention of flood waters for their future use and distribution." See also sec. 401, subds. (5) & (8).
- 438 - If there were not, it seems unlikely that Governor Rockefeller's 1967 N.Y. Water Plan (See p. 3, ante) would contemplate the construction of 58 reservoirs adding 153,000 acres to New York's water surfaces, or that New York City's Hudson-Adirondack project would include the construction of reservoirs in the Adirondacks. See Proceedings, 4th American Water Resources Conference (paper by R.D. Clark) 29 (1968).
- 439 - See, for example, Ark.Stat.Ann., sec. 21-1306; Ind.Stat.Ann. (1960 Replacement, vol. 6, part 1), sec. 27-1403; Ky.Rev.Stat., sec. 151.210 (1966 cum.supp.); Mich.Stat.Ann., sec. 3.533(21) et seq. (cum.supp.); 9 Code of Va., sec. 62.1-106 (1968 Replacement Volume). For a recommendation that Illinois legalize seasonal impoundment by legislation see Cribbet, Illinois Water Rights Law 51 (1958); and for a suggestion that all eastern states legalize cyclical storage see Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1,20 (1959).
- 440 - Ky.Rev.Stat., sec. 151.210 (1966 cum.supp.) provides: "An owner or group of owners of land contiguous to public water, operating under a withdrawal permit, shall have the right to impound and conserve water for their use by impounding such water... when the flow of the stream or level of the lake is such that the impounding will not impair existing uses, or will not unreasonably interfere with a beneficial use by other water users." If the last clause be interpreted as referring to riparian owners other than those who had begun to use the water prior to the enactment of the statute, it could also be interpreted as permitting any impoundment, including one which would be substantially harmful to the owner of an unused riparian right when he exercised it, provided the impoundment was reasonable under all the circumstances. And if the last clause be interpreted as a repetition of the substance of the immediately preceding clause in different verbiage, with the word "unreasonably" qualifying "impair" as well as "interfere", the statute would seem to

permit impoundments which would cause substantial harm to existing uses if found to be reasonable.

- 441 - See the Arkansas and Virginia statutes cited in fn. 439, ante.
- 442 - See fn. 99, ante.
- 443 - See fn. 233, ante. But it is not certain that all courts which have purported to adopt the reasonable use version actually realize this. See pp. 62-5, ante.
- 444 - It will be remembered, however, that the New York law on this point is actually uncertain. See p. 55, ante.
- 445 - That is, water from a source not naturally tributary to the body of water to which it is added. See fn. 113, ante.
- 446 - While in the official report of the case the word "defendant's" appears at this point instead of the word "plaintiff's", the context makes it clear that the court was referring to the plaintiff's saw-mill.
- 447 - 53 N.Y. 11, 12 (1873). As this case was concerned with the accelerated drainage into a stream of surface water which would have ultimately reached it in any event, the court's actual holding was not in regard to the addition of foreign water.
- 448 - 81 N.Y. 86,9 (1880). The statement made in fn. 447 applies also to McCormick v. Horan. The above quotation from that case was paraphrased in part and quoted in part with apparent approval by way of dictum in Kennedy v. Hoog. Inc., 48 Misc. (2d) 107, 112; 264 N.Y.S.(2d) 606 (Sup.Ct., 1964); affd. in part & rev. in part sub. nom., Kennedy v. Moog Servocontrols, Inc., 26 A.D. (2d) 768, 271 N.Y.S. (2d) 928 (1966). As the Appellate Division opinion shows that the trial court found that the ditch into which the defendant was emptying water was not a watercourse and that there was substantial evidence to support such a finding, it follows that Kennedy cannot be treated as a case in which a holding as to the legality of the addition of foreign water to a stream was involved. The wording of the Appellate Division opinion in Kennedy leaves it uncertain as to whether it approved or disapproved the dictum in McCormick in regard to the addition of foreign water referred to by the trial court in Kennedy.
- 449 - 247 A.D. 228,230; 288 N.Y.S. 49; revd. on other grounds, 272 N.Y. 18, 3 N.E. (2d) 618 (1936).
- 450 - Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved in nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication. The word dictum is generally used as an abbreviated

form of obiter dictum - "a remark by the way". - Black's Law Dictionary (Rev. 4th ed.) 541 (1968).

- 451 - Waterford Elec. Light, Heat & Power Co. v. State of N.Y., 208 A.D. 273,282; 203 N.Y.S. 858 (1924); affd.w.o., 239 N.Y. 629, 147 N.E. 225 (1925).
- 452 - See U.S.C., sec. 1962d-4(a)(2) authorizing preparation by the Chief of Engineers of a water supply plan for the northeastern United States providing inter alia for the construction of conveyance facilities by which water may be exchanged between river basins. See also pp. 27-9, ante, where attention was called to the considerable role which additions of foreign water to lakes and streams might play in connection with attempts to devise "physical solutions" for water rights problems.
- 453 - Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275,287; 14 L.Ed. 936 (1853).
- 454 - 42 Md. 442,457 (1875).
- 455 - 1 N.J.L. (1 Coxe) 460 (Sup.Ct., 1795). Although there was no finding in this case that the added foreign water caused no harm, it nevertheless clearly stands for the proposition that the addition of foreign water to a stream is wrongful, though harmless, because the court held that it had no right to go into the question as to whether the addition was harmful or not. The doctrine of this case was confirmed by a dictum in East Jersey Water Co. v. Bigelow, 60 N.J.L. 201, 38 A. 631 (Err. & App., 1897). Although it has been doubted whether Bigelow can properly be cited as establishing that a harmless addition of foreign water can be enjoined (Morreale Hanks, Law of Water in N.J., 22 Rutgers L.R. 621,656 (1968)), it should be noted that it was held in Merritt that it was lawful for the party objecting to the addition to prevent it by self-help, thus affording some support at least to the inference that he would have been successful had he elected to seek injunctive relief. Moreover, it should be borne in mind that if the court in Bigelow had erroneously assumed that a harmless addition had to be enjoined in order to prevent the creation of a prescriptive privilege (see p. 15, ante), as some N.J. courts have done (see Morreale Hanks, supra this note, at 660-1), it might have granted an injunction if it had been sought. But however that may be, it has properly been said that the language in Bigelow "is too broad for comfort. It causes a problem for the not infrequent use of streams as water carriers." (Morreale Hanks, supra this note, at 656.)
- 456 - 32 N.H. 90, 64 Am.Dec. 355 (1855).
- 457 - 369 Ill. 469, 17 N.E. (2d) 34,6 (1938). It is of interest in this connection that an Illinois industrial riparian owner apparently deemed it advisable to secure from the other riparian owners by contract the

privilege of using the stream for the carriage of added foreign water. See Cribbet, Illinois Water Rights Law, 35,6 (1958).

- 458 - 135 Ind. 547,570; 35 N.E. 117, 24 LRA 568 (1893).
- 459 - 137 Mass. 277,284 (1884).
- 460 - See pp. 91-2, ante.
- 461 - Although Ind.Stat.Ann., sec. 27-1409(1) enacted in 1963 and providing that "The Indiana flood control and water resources commission is hereby authorized and empowered to contract to provide certain minimum quantities of stream flow...from the water supply storage in such reservoir impoundments...as have heretofore or may hereafter be financed by the state of Indiana.", and that "Such water may be... released from the reservoir impoundment to create additional flowage beyond normal stream flow for use by the contracting party...", could perhaps be interpreted as legalizing the use of streams "as conduits for delivering reservoir water to parties who contract for its use" (Waite, Beneficial Use of Water in a Riparian Jurisdiction, 1969 Wis.L.R. 864,891), it could be argued that compensation must be made to riparian owners harmed by such use. See Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 128; 7 N.E.(2d) 10 (1937) in which the court enforced the rule "that legislative authority, which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance, must be express." If the Indiana legislature had a contrary intent, a clarifying amendment to the section quoted would seem desirable.
- 462 - See sec. 429-m, subd. (2) set forth at p. 220, post.
- 462a - What has already been said as to why a legislature need not hesitate to authorize substantially harmful but reasonable changes in the location or course of a body of water because some such changes would involve construction so massive and expensive that a court might be reluctant to order its removal or alteration to meet new conditions (see pp. 76-7, ante) indicates that such considerations need not deter a legislature from authorizing substantially harmful additions of foreign water to lakes and streams when reasonable under all the circumstances and no flooding is involved, even though some foreign water addition projects might involve costly construction of a very substantial nature. See also p. 88, ante in regard to large and expensive reservoirs for seasonal storage of water.
- 463 - See p. 90 & fn. 99, ante.
- 464 - Physical solutions involving harmless additions of foreign water became legal in New York with the enactment in 1966 of sec. 15-0701 of the Environmental Conservation Law. (See p. 23, ante.) Retention of rules prohibiting substantially harmful but reasonable diversions, impoundments and additions of foreign water (pp. 68-94, ante) might leave serious obstacles in the way of desirable physical solutions.

- 465 - See N.Y. Environmental Conservation Law, sec. 15-0701, subd. (1) set forth at p. 23, ante.
- 466 - See the often cited case of Hoffman v. Stone, 7 Cal. 46 (1857) and the comment on its doctrine in City of Los Angeles v. City of Glendale, 23 Cal.(2d) 68, 142 P. (2d) 289, 294 (1943).
- 467 - See the comment at pp. 18-20, ante on McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914).
- 468 - See p. 87, ante. While the legality of an addition of foreign water causing flooding was not litigated in Matter of Gillespie (Esopus Creek Section No. 1), 247 A.D. 228, 288 N.Y.S. 49; revd. on other grounds, 272 N.Y. 18, 3 N.E. (2d) 618 (1936), a proceeding by New York City to obtain by eminent domain the privilege of adding such quantities of foreign water to a stream that flooding would result, the city must have believed that such an addition was unlawful, else it would never have instituted the proceeding. And the dictum from the Gillespie opinion quoted at p. 92, ante clearly indicates that the court concurred in the city's belief.
- 469 - See sec. 429-o set forth at p. 220, post.
- 470 - Miller v. Wheeler, 54 Wash. 429, 103 P. 641,3; 23 LNS 1065 (1909); Fell v. M. & T., Inc., 73 Cal.App.(2d) 692, 166 P.(2d) 642 (1946).
- 471 - See, for example, Colo.Rev.Stat. (1963), sec. 148-5-2 and Rev. Code of Wash.Ann., sec. 90.03.030 which provide that the added water shall not raise the level of the lake or stream "above ordinary highwater mark".
- 472 - While in Fewell v. Catawba Power Co., 102 S.C. 452, 86 S.E. 947 (1915) the court apparently did not believe that it would be reasonable in view of the facts in that case to hold that the farmer should avoid the harm by building a bridge as a substitute for his drowned ford, this does not, of course, preclude the possibility that the court might have reached the opposite conclusion on other facts. Whether plaintiff's ability to avoid the harm, which is one of the factors bearing on the issue of reasonableness (Torts Restat., sec. 852-4 (1939); City of N.Y. v. Blum, 208 N.Y. 237, 101 N.E. 869 (1913)) will have the effect of showing that the defendant's activity is reasonable and that he is therefore neither liable in damages nor subject to injunctive relief, or will merely affect the terms of the injunctive relief, leaving the defendant liable in damages, will depend on the relative practicability of the means of avoidance available to the parties and on the other circumstances of the case. See 4 Torts Restatement 712 (1939); Hancock v. Stull, 206 Md. 117, 110 A.(2d) 522 (1955); Helms v. Zeitzoff, 407 Pa. 482, 181 A.(2d) 277 (1962); Pagliotti v. Acquistapace, 64 Cal.(2d) 873, 50 Cal.Rptr. 282, 412 P.(2d) 538 (1966).

- 473 - See the authorities cited in fn. 89, ante.
- 474 - Torts Restatement, sec. 942 (1939).
- 475 - "Whatever the relative importance of the great mining and reduction works, using the water...and of the agriculturists using the same water below, from either a public or private point of view, the right of the lesser interest is not thereby subordinated to the greater. That is sometimes a consideration when a plaintiff seeks relief by injunction rather than by an action at law for damages."-- Arizona Copper Co. v. Gillespie, 230 U.S. 46,55-6; 33 Sup.Ct. 1004, 57 L.Ed. 1384 (1913). This distinction is emphasized in Note: 79 Yale L.J. 102,9 n. 34 (1969).
- 476 - 164 N.Y. 303, 58 N.E. 142 (1900).
- 476a - While in Townsend v. Bell, 167 N.Y.462,470, 60 N.E. 757 (1901) the court held that when the reasonableness of defendant's pollutive activities was in issue, evidence of the number of his employees was admissible as bearing on the extent of his business, which in turn had a direct bearing on the question of reasonableness, the court did not expressly say, or take the position except possibly by implication, that when determining reasonableness, the relative importance to the public of the respective activities should or even could be taken into account.
- 477 - 164 N.Y. 303,6; 58 N.E. 142 (1900).
- 478 - 164 N.Y. 303,9; 58 N.E. 142 (1900).
- 479 - 113 Pa. 126, 6 A. 453 (1886).
- 480 - 164 N.Y. 303,321; 58 N.E. 142 (1900).
- 481 - 164 N.Y. 303,319; 58 N.E. 142 (1900).
- 482 - 164 N.Y. 303,319-20; 58 N.E. 142 (1900).
- 483 - 164 N.Y. 303,322; 58 N.E. 142 (1900).
- 484 - 164 N.Y. 303,319; 58 N.E. 142 (1900).
- 485 - Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913).
- 486 - As the defendant did in Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886) in which it was held that the right of a riparian owner that a stream from which she was drawing her domestic supply should not be polluted was of less public importance than the need of the coal company to use the stream as an outlet for its mine water, in view of the ready availability to the plaintiff of a satisfactory water supply from a municipal source, and that the defendant's activity was therefore reasonable and lawful. The court intimated that the result would have been different, however, if the defendant had been polluting a municipal water supply. (6 A. 453,9). And the defendant was later held liable for such pollution in Pa. Rr. Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386, cert.

den., 267 U.S. 592, 45 S.Ct. 228, 69 L.Ed. 803 (1924). The court said that no language in the Sanderson opinion "can be tortured into an implication that the waters of the Commonwealth can be polluted by its mines, where the public is affected as it is here. It has always been under our law a nuisance to pollute a stream from which the public gets its supply of water." (281 Pa. 233, 247.) For one of the latest comments on Sanderson, which, like most of its predecessors, fails to refer to a key fact in that case - the availability to the plaintiff of a municipal water supply - see Note; 79 Yale L.J. 102,4 (1969).

487 - 140 N.Y. 267, 35 N.E. 592, 24 LRA 105 (1893).

488 - 140 N.Y. 267,277,280-1; 35 N.E. 592, 24 LRA 105 (1893).

489 - It was cited in the brief of one of the parties.

490 - See Torts Restat., chaps. 40 & 41 (1939).

491 - Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913) sheds no appreciable light on the question in hand, for while in this case the defendant was enjoined from polluting a stream despite its large investment and payroll, the defendant, by admitting its liability for damages, conceded that its conduct was unreasonable, and contested only the appropriateness of injunctive relief. Consequently the question as to the relevance of the public importance of its activity to its reasonableness was not before the court. Moreover, Boomer v. Atlantic Cement Co., Inc., 26 N.Y.(2d) 219, 257 N.E.(2d) 870, 309 N.Y.S. (2d) 312 (1970), also discussed in fn. 89, ante and in fn. 548, post, is of no help with respect to this question. Although in Boomer it is clear that in the trial court (55 Misc. (2d) 1023, 287 N.Y.S. (2d) 112 (Sup.Ct., 1967)), in the Appellate Division (30 A.D.(2d) 480, 294 N.Y.S. (2d) 452 (1968)) as well as in the Court of Appeals it was deemed proper that consideration should be given to the public interest when passing on the appropriateness of injunctive relief in a nuisance case, there is nothing in any of the three opinions which warrants the inference that either of the three courts gave any thought whatever to the relevance of the public interest to the question as to the reasonableness of the defendant's conduct and to its liability for damages. The fact that the defendant was held liable for damages despite the proof of the importance of its operations to the public does not establish that the courts believed that the public interest was irrelevant to this issue; for if they had considered it, they might well have concluded that, although relevant, it was not controlling in the case before them in view of all the facts. Nor did the defendant's liability for damages for interference with the plaintiff's percolating water supply in Forbell v. City of N.Y., 164 N.Y. 522, 58 N.E. 644, 51 LRA 695 (1900) appear to have been based on the view that the public interest can never be taken into account when determining reasonableness, but

rather on the court's conclusion that the public interest would be better served in the case before it by relegating the city to its power of eminent domain, thus spreading the cost of its water supply over its citizens by taxation, than by depriving individual water rights owners of their water supply without compensation. The court said (164 N.Y. 522,7): "We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive, before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff." In substantial accord see Kratovil & Harrison, *Eminent Domain-Policy & Concept*, 42 Calif.L.R. 596 (1954). See also authorities cited in fns. 375, ante and 529, post.

- 492 - Haber & Bergen, *Law of Water Allocation in the Eastern U.S.* (chap. by Haar & Gordon), 7-8 (1958).
- 493 - 256 Ala. 269, 54 So.(2d) 571,4 (1951).
- 494 - 217 Minn. 536, 15 N.W. (2d) 174,183 (1944).
- 495 - 129 N.Car. 93, 39 S.E. 729 (1901).
- 496 - 130 Miss. 764, 95 So. 75, 28 ALR 1250 (1923).
- 497 - 379 Mich. 667, 154 N.W.(2d) 473,484-5 (1967).
- 498 - See *Wasserburger v. Coffee*, 80 Neb. 149, 141 N.W.(2d) 738;746 (1966); & *Joslin v. Marin Munic.Water Dist.*, 67 Cal.(2d) 132, 60 Cal.Rptr. 377,42 P.(2d) 889,895 (1967). In *Van Alstyne, Inverse Condemnation, Unintended Physical Damage*, 20 Hast. L.J. 431,471, fn. 192 (1969) it is said: "...Joslin strongly intimates that 'reasonableness' is a relative concept, to be determined by comparing the relative social utility of the competing water uses before the court." In view of the fact that the court actually did consider and give weight to the relative social utility of the parties' activities (it was criticized for doing so in 56 Cal.L.R. 1775,7 (1968)), the quoted sentence might fairly be characterized as understatement.
- 499 - 48 Oh.St. 41,59; 26 N.E. 630, 12 LRA 577 (1891).
- 500 - 185 Va. 758, 40 S.E.(2d) 298, 301(1946).
- 501 - See pp. 97-100, ante.
- 502 - See p. 218, post.
- 503 - See p. 103, ante.
- 504 - See p. 102, ante.
- 505 - See p. 101, ante.

- 506 - As to the Pa. law see fn. 486, ante.
- 507 - For the citation to this case and the position taken in it see fn. 475, ante.
- 508 - See p. 97, ante.
- 509 - Discussed in fn. 89, ante.
- 510 - Note, Purity & Utility, 84 Un. of Pa.L.R. 630,7 (1936).
- 511 - Torts Restat., secs. 827 & 828 (1939). In Prosser on Torts (3d ed., 1964) it is said in sec. 90 on private nuisance at p. 618: "The social value of the use which the plaintiff makes of his land is always a material factor...So far as the defendant is concerned, the utility of his conduct is always affected by the social value which the law attaches to its ultimate purpose." See also Note, Purity & Utility, 84 Un. of Pa.L.R. 630,7 1936; Maloney, Plager & Baldwin, Water Pollution, 20 Un. of Fla.L.R. 131,6 (1967).
- 512 - 4 Torts Restat., pp. 347-350 & secs. 853 & 854 (1939). In Prosser on Torts (3d ed., 1964) it is said with respect to rights of riparian owners in sec. 90 on private nuisance at p. 622: "The right of each to make use of the water is qualified by that of the other, and the court must strike a balance between the two, having in view the same considerations as in the case of any other nuisance." In Levi, Highest and Best Use: An Economic Goal for Water Law, 34 Mo.L.R. 165,8 (1969) the importance of taking account of the social value of the use is stressed in the following language: "Comparing the 'reasonableness' of two competing uses necessitates a determination of the use with the higher value." See also 5 Powell on Real Prop. 369 (1968); Lauer, Reflections on Riparianism, 35 Mo.L.R. 1, 24-5 (1970) and p. 100, ante.
- 513 - Holmes, The Common Law, 35-6 (1881). This passage was cited in Parish v. Pitts, 244 Ark. 1239, 429 S.W.(2d) 45,7 (1968) in support of the proposition that "Considerations of public policy are not and never have been for determination by the Legislature alone."
- 513a - Of course the determination as to whether a particular use of a lake or stream is in the public interest is often a difficult task; and a court's conclusion in this regard will not always win unanimous approval particularly when consideration of the public interest results in the destruction of a valuable water-based business as it did in Joslin v. Marin Munic. Water Dist., 67 Cal.(2d) 132, 60 Cal.Rptr. 377, 429 P. (2d) 889 (1967). For critical comments on this case see Meyers' review of A Treatise on the Law of Waters, 77 Yale L.J. 1036, 1060 (1968); Malakoff, Erosion of a Water Right, 5 Cal.West.L.R. 44 (1968) & The Supreme Court of California, 56 Cal.L.R. 1612,1777 (1968). The emphasis put in Joslin on the public interest at the expense of the complaining riparian owner is deplored in Van Alstyne, Inverse Condemnation:

Unintended Physical Damage, 20 Hast.L.J. 431,472 (1969).

- 514 - Trelease, Coordination of Riparian & Appropriative Rights to the Use of Water, 33 Tex.L.R. 24 (1954); Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Fisher), 82-3 (1958); 5 Water for Peace (chap. by Trelease) 703 (1967); Corbett, Constitutionality of a Mandatory Permit System & Denial of a Water Use in the Public Interest, 4 Land & Wat.L.R. 487,495 (1969).
- 515 - Trelease, Law, Water & People, 18 Wyo.L.J. 3,11 (1963); Proceedings Pa. State Water Resources Law Colloquium (Paper by Trelease), 20 & 22 (1967).
- 516 - Trelease, Alaska's New Water Use Act, 2 Land & Water L.R. 1,24 (1967); 5 Water for Peace (chap. by Trelease) 703 (1967) and Maloney & Ausness, A Modern Proposal for State Regulations of Consumptive Uses of Water, 22 Hast. L.J. 523,6 (1971).
- 517 - Trelease, Alaska's New Water Use Act, 2 Land & Water L.R. 1, 24-5 (1967); 5 Water for Peace (chap. by Trelease) 703-4 (1967); Young & Norton v. Hinderlider, 15 N.Mex. 666, 110 P. 1045 (1910); Tanner v. Bacon, 103 Ut. 494 136 P. (2d) 957 (1943). This power would be explicitly granted by a bill recently introduced in Montana. See Stone, The Long Count on Dempsey: No Final Decision in Water Right Adjudication, 31 Mont.L.R. 1, 21 (1969).
- 518 - Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1,11 (1959); Plager, Law of Water Allocation, 1968 Wis.L.R. 673,692; and authorities cited in fns. 511 & 512, ante.
- 519 - Trelease, Alaska's New Water Use Act, 2 Land & Water L.R. 1,24 (1967).
- 520 - Bard & Beck, An Institutional Overview of the North Dakota State Water Conservation Commission, 46 N.Dak.L.R. 31,41 (1969).
- 521 - 5 Water for Peace (chap. by Trelease) 704 (1967).
- 522 - See pp. 77-9, ante.
- 523 - See p. 208, ante.
- 524 - See fn. 367, ante.
- 525 - Chapman v. City of Rochester, 110 N.Y. 273, 18 N.E. 88, 1 LRA 296 (1888); Sammons v. City of Gloversville, 175 N.Y. 346, 67 N.E. 622 (1903); Luther v. Village of Batavia, 169 A.D. 71, 154 N.Y.S. 784 (1915).
- 526 - 18 McQuillin, Law of Munic. Corps. (3d ed. rev.) sec. 53.131 (1963); Aycock, Water Use Law in N.Car., 46 N.Car.L.R. 1,13 (1967); City of Mansfield v. Balliett, 65 Oh.St. 451, 63 N.E. 86, 58 LRA 628 (1901);

Donnelly Brick Co., Inc. v. City of New Britain, 106 Conn. 167, 137 A. 745 (1927). Such immunity from suit as a municipality may enjoy when performing a governmental function does not shield it from liability if such performance results in the creation of a nuisance interfering with plaintiff's enjoyment of his land. (18 McQuillin, Law of Munic. Corps. (3d ed. rev.) secs. 53.11, 53.12, 53.47, 53.49, 53.127 (1963); Rhodes v. City of Durham, 165 N.Car. 679, 81 S.E. 938 (1914).)

- 527 - Grey v. Mayor of City of Paterson, 58 N.J.Eq. 1, 42 A. 749, 752 (1899); revd. on other grounds, 60 N.J.Eq. 385, 45 A. 905, 48 LRA 717 (Err. & App., 1900); Donnelly Brick Co., Inc. v. City of New Britain, 106 Conn. 167, 137 A. 745, 7 (1927).
- 528 - Luther v. Village of Batavia, 169 A.D. 71, 154 N.Y.S. 784 (1915); Donnelly Brick Co., Inc. v. City of New Britain, 106 Conn. 167, 137 A. 745, 7 (1927). Contra: City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062, 48 LRA 707 (1899). As to the diminishing influence of this case in Indiana see Note, Purity & Utility, 84 Un.Pa.L.R. 630, 6 (1936).
- 529 - See authorities cited and quoted from in fns. 375 & 491, ante. In Aycock, Water Use Law in N.Car., 46 N.Car.L.R. 1, 13 (1967) attention is called to the fact that the pendency of 40 suits against the city to recover for stream pollution was not enough to deter the court in Donnell v. City of Greensboro, 164 N.Car. 330, 80 S.E. 377 (1913) from holding the city liable for pollution in the action before it at the moment. In Acquackanonk Water Co. v. Watson, 29 N.J.Eq. 366 (Err. & App., 1878) the court affirmed an injunction restraining a water company from polluting a stream by the substitution of water to replace that which it was diverting. In Morreale Hanks, Law of Water in N.J., 22 Rutgers L.R. 621, 673 (1968) it is said inter alia concerning this decision: "One may quarrel with the result, but hardly with the process. Perhaps one should not even quarrel with the result. To find that the water company has acted reasonably means it gains without cost what it or the municipalities it supplies ought to have purchased. At least they should have to purchase from those lower riparians whose prior use gives them some claim to the protection of their reasonable expectations."
- 530 - 11 McQuillin, Law of Munic. Corps. (3d ed. rev.) sec. 32.26 (1964); 13 id. sec. 37.211 (1950); 18 id. sec. 53.127 (1963); Stoebuck, Condemnation by Nuisance, 71 Dick.L.R. 207, 211, 219 (1967); Grey v. Mayor of City of Paterson, 60 N.J.Eq. 385, 45 A. 995, 48 LRA 717 (Err. & App., 1900); Donnell v. City of Greensboro, 164 N.Car. 330, 80 S.E. 377 (1913); Snively v. City of Goldendale, 10 Wash.(2d) 453, 117 P.(2d) 221 (1941). Contra: City of Valparaiso v. Hagen, 153 Ind. 337, 54 N.E. 1062, 48 LRA 707 (1899).
- 531 - Although some courts have held that a taking of private property without compensation is constitutional if effected by a valid exercise

of the police power, (see p. 44, ante), it seems to be the prevailing view that compensation must be given for a taking resulting from stream pollution by a municipality, even when drainage of its sewage into the stream has been authorized by the state. (11 McQuillin, Law of Munic. Corps. (3d ed. rev.) sec. 31.27, p. 233 (1964); Huffmire v. City of Brooklyn, 162 N.Y. 584, 591; 57 N.E. 176, 48 LRA 421 (1900); Grey v. Mayor of City of Paterson, 60 N.J. Eq. 385, 45 A. 995,7; 48 LRA 717 (Err. & App., 1900); City of Mansfield v. Balliett, 65 Oh.St. 451, 63 N.E. 86, 58 LRA 628 (1901).) Since a taking by valid exercise of the police power is non-compensable (see p. 44, ante), the prevailing view necessarily excludes the possibility that a taking resulting from municipal stream pollution could be treated as a valid exercise of the police power. Any immunity from suit which a municipality may enjoy when performing a governmental function does not protect it from liability when such performance results in a taking of plaintiff's property not justifiable under the police power. (18 McQuillin, Law of Munic. Corps. (3d ed. rev.) sec. 53.25; Van Alstyne, Statutory Modification of Inverse Condemnation, 19 Stan.L.R. 727,8 (1967); Donnell v. City of Greensboro, 164 N.Car. 330, 80 S.E. 377 (1913); New Hampshire Water Resources Brd. v. Pera, 108 N.H. 18, 226 A.(2d) 774 (1967).)

532 - See p. 46, ante.

533 - See p. 108, ante.

534 - See p. 221, post.

535 - See, for example, Ky.Rev.Stat., sec. 151,250; Mich.Stat.Ann., secs. 9.1195, 11.431 et seq., 11.455; 53 Purdon's Pa.Stat.Ann., sec. 47201 and the statutes cited in Heath, Water Management Legislation, 2 Land & Water L.R. 99, 104-6 (1967).

536 - See the descriptions of the Ia., Ky., Md., Minn. & Miss. statutes in Heath, Water Management Legislation, 2 Land & Water L.R. 99, 104-6 (1967).

537 - See the statutes cited in Hines, Public Regulation of Water Quality, 52 Ia.L.R. 186,230 (1966).

538 - Although Environmental Conservation Law, sec. 15-0105(8) provides that "in addition to other recognized public beneficial uses and control of water as provided by this Article 15 or by any other statute, the regulated acquisition, storage, diversion and use of water for the supplemental irrigation of agricultural lands within the state is a public purpose and use, in the interests of the health, safety and welfare of the people of the state, and for their interest.", and although sec. 15-0109 provides that "The department shall exercise its powers and perform its duties in any matter affecting the construction of improvements to or developments of water resources

for the public health, safety or welfare, including but not limited to the supply of potable waters for the various municipalities and inhabitants thereof, the use of water for industrial and agricultural operations, the developed and undeveloped water power of the state, the facilitation of proper drainage and the regulation of flow and improvement of the rivers of the state.", there appears to be no statute clearly providing that all withdrawals of water for industrial or irrigation purposes are unlawful without a permit. While sec. 15-1501(1) does provide "No person or public corporation who is authorized and engaged in, or proposing to engage in, the acquisition, conservation, development, use and distribution of water for potable purposes, for the irrigation of agricultural lands, for projects taken pursuant to Article 5-D of the County Law, or for multi-purpose projects authorized by a general plan adopted and approved pursuant to Title II of this article, shall have any power to do the following until the department shall have approved the same...(a) to acquire or take a water supply..." this language, in view of the purport of the subsequent subdivisions of the section, would appear to be applicable to persons or corporations wishing to obtain water to sell to others for irrigation and other purposes, and not applicable to farmers who wish to withdraw irrigation water for their own use. (Allee, Governmental Facilitation of Irrigation in N.Y. (Doctoral Thesis, Cornell University) 175, fn. 1 (1961)). At any rate, this interpretation is in accord with the current practice of New York farmers who, according to Prof. Harry A. Kerr of Cornell's Department of Agronomy, carry on extensive irrigation operations for their own benefit without applying for the approval of the Water Resources Commission.

There are several other sections of the Environmental Conservation Law which, although included in title 17 of Art. 15 under the heading "Water Power", could conceivably be interpreted as authority for the proposition that the withdrawal of stream or lake water for irrigation or for industrial purposes or indeed for any purpose without obtaining a state permit providing for the payment of an equitable rental for the use of the water is unlawful. Among these sections are the following:

Sec. 15-1701. "Where any person takes, diverts, appropriates, or otherwise uses, whether by virtue of the provisions of title 17 of this article or otherwise, the waters of the state over which the state has the proprietary ownership of the flow and to the use of which the state has the right paramount and exclusive, or concurrently with any other jurisdiction, such waters shall remain subject to the power and control of the state for the purposes of regulating, licensing, controlling, or terminating the use and disposition of the same by such person, as well as for the purposes of exacting any rentals or charges therefor."

Sec. 15-1705(1). "The department, subject to the provisions of title 17 of this article, may upon application issue to any person or public corporation heretofore or hereafter authorized to develop, use

furnish or sell power in this state or to a municipality of the state having such authority, a license authorizing the diversion and use for power or other purposes of any of the waters of the state in which the state has a proprietary right or interest, or the bed of which, or the real property required for use of such waters or the right to develop the water power, is vested in the state; or of boundary waters of the state where the state has jurisdiction over the diversion or interference with the flow of the same solely or concurrently with any other jurisdiction or owner of a proprietary right; or to any such applicant when the owner of any water power site or sites which it uses or proposes to use for the production, sale and distribution of heat, light or power to the public; and subject to the property right of others including riparian rights, authorizing the construction, maintenance and operation in, across or along any of such lands and waters of such dams, reservoirs, diverting canals or races, water conduits, power houses, transmission lines and other project works as are deemed necessary or convenient for the development, transmission and utilization of the developable power and authorizing in connection therewith the use of dams or other structures or contiguous or adjacent lands belonging to the state..."

Sec. 15-1745. "Prohibited diversions. 1) Unless a license has been obtained therefor under this title, or the diversion of such waters is subject to the charging or imposition of an equitable rental under this title, it shall be unlawful for any person or public corporation who has been notified by the department to desist from such conduct, to willfully take, divert, draw or make use of, for power and/or other commercial or manufacturing purposes: (a) waters, or the bed or other real property required for the use of such waters, in which the state has a proprietary right or interest; (b) boundary waters of the state concerning which the state has jurisdiction over the diversion or interference with the flow of the same for power purposes, solely or concurrently with any other jurisdiction or owner of a proprietary right."

Provisions less clearly related to but possibly pertinent to the question under consideration may be found in other sections of title 17 not quoted above. Thus far, however, despite the omission from sec. 15-1701 of language restricting its application to uses for power, the inclusion in sec. 15-1705(1) of the phrase "or other purposes," and the inclusion in sec. 15-1745 of the phrase "or other commercial or manufacturing purposes", the title 17 sections appear to have been enforced only as against corporations diverting water for the production of electric power and against one corporation which was using water for manufacturing purposes taken from that part of the Seneca River which had been incorporated into the state canal system; the riparian rights in such part of the river having been appropriated by the state at the time of such incorporation. Although four applications were subsequently made to the predecessors of the Environmental Conservation Department for permits to withdraw water from rivers or lakes (from the Mohawk River and the Barge Canal for cooling purposes; from Onondaga Lake for flushing rolling mills; from the

Hudson River for cooling purposes at a university's research station; from the Niagara River and Burnt Ship Creek for a chemical company's research center), all were, after consideration, tabled by the commission without action, perhaps because of doubt as to whether the legislature intended by the Part VII sections to impose a permit requirement on withdrawals of water for other than power uses, or because of doubt as to whether the state actually had a proprietary ownership of any stream or lake water which had not been incorporated into the state canal system, or because of a doubt, despite the decisions in *State of N.Y. v. System Properties, Inc.*, 2 N.Y.(2d) 330, 141 N.E.(2d) 429, 160 N.Y.S.(2d) 859 (1953) and *Niagara Falls Power Co. v. Duryea*, 185 Misc. 696, 57 N.Y.S.(2d) 777 (Supt.Ct., 1945) discussed at pp. 178-188, post, as to the constitutional power of the legislature to collect a rental from a riparian owner for the exercise of common law privileges which are recognized as existing without a grant from the state even in navigable bodies of water, the beds of which are owned by the state. (*United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38, 44-5; 123 N.E. 200 (1919) and *Peo. v. N.Y. & Ontario Power Co.*, 219 A.D. 114,8; 219 N.Y.S. 497 (1927).

If subsequent to these applications, three of which were made in 1948 and one in 1958, any New York administrative body with jurisdiction in the water field has taken a different attitude toward the question as to whether title 17 imposes a permit requirement on agricultural and industrial users, the author is unaware of it. It would seem reasonable therefore to take the position that title 17 has been administratively construed as not imposing such a requirement. And because the legislature has made no response to repeated recommendations by its Joint Legislative Committee on Revision of the Conservation Law that something be done about title 17 in order to make its intent and meaning more clear, it would seem fair to infer that the legislature has acquiesced in such administrative construction. Since much of the extensive investment by farmers and industrialists in water-dependent projects during several decades may well have been made in reliance upon this administrative interpretation and the legislature's acquiescence in it, it seems most unlikely that the New York courts would be willing to hold at this late date that water could not be lawfully withdrawn by riparian owners from lakes and streams for agricultural and industrial purposes without a state permit and without incurring a liability to pay rent for its use. For a more detailed account of the history of the provisions of title 17, and for more complete discussion of such of them as are ambiguous, see the 1966 Report of the Cornell University Water Resources Center to the New York Temporary State Commission on Water Resources Planning entitled "A Study of Selected Aspects of the Powers of New York State Over the Waters of the State" at pp. 17-20, 45-6 and 85-6.

Nor do withdrawals of water for irrigation or for industrial purposes appear to be made subject to a permit requirement by the provisions of the Stream Protection Law (Environmental Conservation Law, secs. 15-0501 to 15-0515) which seem intended to apply to alterations in bodies of water

effected by changes in their course, channel or bed or by dams or docks rather than by withdrawal of water. (See the Environmental Conservation Law, sec. 15-0501, par. 3, subds. (b), (c) & (d); sec. 15-0505, pars. 3 & 4; sec. 15-0503, par. 3, subds. (b), (c) & (d).

539 - See pp. 103-7, ante.

540 - See, for example, Environmental Conservation Law, secs. 15-0501, 15-0505, 15-0503 and 15-1503. See also sec. 15-1527 as interpreted in *Sperry Rand Corp. v. Water Resources Commission*, 30 A.D.(2d) 276, 291 N.Y.S. (2d) 716 (1968); lv. to app.den., 24 N.Y.(2d) 737 (1969).

541 - *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. (2d) 801 (1936); *Spring Valley Water Works & Supply Co. v. Wilm*, 14 A.D.(2d) 658, 218 N.Y.S.(2d) 800 (1961); *Hackensack Water Co. v. Village of Nyack*, 209 F.Supp. 671, 683 (1968); *Sperry Rand Corp. v. Water Resources Commission*, 30 A.D. (2d) 276, 291 N.Y.S.(2d) 716 (1968); lv. to app.den., 24 N.Y. (2d) 737 (1969). These cases also show that although the harmed party cannot maintain a proceeding against the commission to have its permit annulled on the ground that its exercise would be harmful to him, he is not precluded from his damage action by a provision in the permit statute that the administrative agency shall determine whether the plans proposed make provision for the payment of all legal damages which will result from the execution of the plans, as does Environmental Conservation Law, sec. 15-1503, unless as in *Otisco Lake Community Assn., Inc. v. Wilm*, 22 A.D.(2d) 844, case 3, 254 N.Y.S.(2d) 204 (1964) the provision has been complied with. While such compliance was not referred to in the court's opinion, the decision of the Water Resources Commission pointed out that most of the necessary rights had been acquired and that plans had been made for payment of legal damages to the holders of unacquired rights; and there is no reference in the court's opinion to any attack on this finding. If the permittee has the power of eminent domain, the harmed party could not in view of the *Ferguson* case obtain an injunction restraining the exercise of the permit if the permittee pays the damages assessed against him. Whether a permittee who lacks the power of eminent domain would enjoy the same immunity from injunctive restraint at the suit of the harmed party seems thus far to be an open question in New York. In the *Sperry* case the court said: "The respondent (referring to the commission) is correct when it argues that its concern with an application for a permit under Article V is properly with the public interest and not with the competing interests of two adjacent landowners in a water supply for their purely private interests. The resolution of such private interests has been left by Article V (now Art. 15, title 7, sec. 15-0701) to the parties themselves and such redress as the courts of this State may provide." It is conceivable that the redress referred to might include injunctive relief (*Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11, 191 N.E. 239 (1934)), despite the commission's finding that the applicant's project was in the public interest, if the court concluded that the project was not so essential to the public interest as to cause that interest to outweigh all other relevant considerations. A contrary holding would seem to recognize an ability in

the commission to confer upon a private party the practical equivalent of the power of eminent domain; and it is far from clear that the legislature intended to clothe the commission with such a power even if it could constitutionally do so. Support for this suggestion is afforded by dicta uttered by Sloan, J. in an unreported decision of the Supreme Court rendered in 1968 of a motion in *Allen v. Cayuta Lake Property Owners Assn., Inc.*, the original complaint in which sought only damages, for leave to serve a supplemental complaint seeking injunctive relief against the maintenance of a dam the construction of which had been authorized by a permit granted by the Water Resources Commission. The holding in *Chase Manhattan Bank v. Broadway, Whitney Co.*, 57 Misc. (2d) 1091, 294 N.Y.S. (2d) 416 (Sup.Ct., 1968); affd. on opinion below, 24 N.Y.(2d) 927, 249 N.E.(2d) 767, 301 N.Y.S.(2d) 989 (1969) that sec. 881 of the Real Prop. & Proceedings Law authorizing a court to grant permission to A to enter on the land of B without B's consent in order to make repairs on A's building which he could not otherwise make, subject to liability in damages for the harm caused B by such entry, is constitutional does not appreciably weaken the force of this suggestion. In the first place, it is unmistakably clear that the legislature intended to authorize the court to give A the power of eminent domain; and in the second place the extent of the eminent domain power which the court is authorized to grant is very limited. See also p. 77 & fn. 358, ante.

542 - See pp. 97-101, ante.

543 - For the text of sec. 429-m see p. 218, post.

544 - For references to eastern permit statutes, some of which exempt certain important uses, and some of which require permits only for uses in areas where water is in short supply, see *Water Resources and the Law* (chap. by Ziegler) 93-6,111 (1958); Heath, *Water Management Legislation in the Eastern States*, 2 *Land & Water L.R.* 99, 105 (1967); Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S.*, 43 *Ind.L.J.* 383,390-2 (1968).

545 - As in *Illinois - Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11,191 N.E. 239 (1934); as in *Main - Stanton v. Trustees of St. Joseph's College*, 233 A.(2d) 718 (Me.Sup.Ct., 1967); as apparently in *Iowa - Harrison-Pottawattamie Drainage Dist. No. 1 v. State*, 156 N.W.(2d) 835 (Ia.Sup.Ct.,1968); and as apparently in *Maryland - Lawrence v. State Dept. of Health*, 247 Md. 367, 231 A.(2d) 46 (1967). See generally *Proceedings Pa. State Water Resources Law Colloquium* (Paper by H.H. Ellis) 24,30 (1967).

546 - As to the importance of seeing to it that the testimony of qualified persons as to the relation between a litigant's claim and the public interest is available to the court see *O'Connell*, *Iowa's New Water Statute*, 47 *Ia.L.R.* 549,573 (1962).

548 - Relevant in this connection is the report in the *Ithaca Journal* of May 4, 1970 that Mr. Lefkowitz, the New York Attorney General, had written to the Chief Judge of the New York Court of Appeals asking that trial courts notify the Attorney General of pollution cases brought before them by private persons, as he might wish to intervene as a friend of the court

even though there is no statutory authority for him to participate on behalf of the state in private pollution litigation. Apparently this request was made after the release of the opinion in *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y.(2d) 219, 257 N.E.(2d) 870, 309 N.Y.S.(2d) 312 (1970) in which the court, while taking into account the interest of the capitol district when passing on the appropriateness of the injunctive relief sought in an air pollution case, declined to consider whether the injunction asked for was in furtherance of the interest of the general public. (For previous comment on the doctrine of balancing interests or hardships and on *Boomer* see fns. 89 & 491, ante.) If the Attorney General had had notice of the pendency of the *Boomer* case and had intervened, it is conceivable that the court might have been supplied with enough information to make it feel qualified to consider the interest of the entire state as well as that of the capitol district when arriving at its decision; and it would seem that this would have been a more desirable situation than now exists. As things stand now the defendant in *Boomer* has been told by the court that as far as the plaintiffs are concerned, it may continue to harm them in perpetuity by the discharge of polluting substances provided it pays them the amount by which such conduct will decrease the value of their properties. But if the defendant makes this payment it subjects itself to the risk that it may ultimately be directed by the Air Pollution Control Board to stop polluting the air and thus be deprived of the privilege for which it had paid. It would seem, therefore, that the Attorney General's present lack of authority to intervene in private pollution litigation should be supplied by statute. Analogical precedent for such authorization is afforded by Mich.Stat.Ann., sec. 3.211 empowering the attorney general "to intervene in any action...in any court of the State whenever such intervention is necessary in order to protect any right or interest of the State, or of the people of the State." In *Thompson v. Enz*, 379 Mich. 667, 154 N.W.(2d) 473 (1967), an action involving riparian rights and brought by private parties against private parties, the court remanded the case for determination of the reasonableness of the defendant's activities in respect to a lake and said at p. 485: "Undoubtedly, at the new hearing, the Attorney General of the State of Michigan will intervene under his statutory general powers of intervention for the purpose of protecting the rights of the public." While the court did not give the number of the section which it had in mind, it seems likely that it was referring to sec. 3.211. Although the state owned a large riparian tract on the lake (see p. 478), the court said nothing indicating that its assumption that intervention by the attorney general would be proper was dependent on the state's position as a riparian owner. In Minn.Stat.Ann., secs. 105.71-105.79 provision is made for intervention by the Minn. Water Resources Board, composed of persons who are conversant with water problems and conditions within the watersheds of the state, in proceedings on an application to the Comr. of Conservation for a water use permit in order that the conflicting aspects of public interest involved can be presented and the controlling policy determined. See also Okla.Stat.Ann., tit. 82, sec. 4

providing that the attorney general shall intervene on behalf of the state in any suit for the adjudication of rights to the use of water if notified by the Water Resources Board that the public interests would be served by such action.

548a - That courts are not likely under common law procedures to have before them satisfactory expert testimony as to which one of two competing uses is of greater importance to the public see Waite, Beneficial Use of Water in a Riparian Jurisdiction, 1969 Wis.L.R. 864,879; and that consideration is being given to the possibility of resort to new devices to improve such situations see Howard, Adjudication Considered as a Process of Conflict Resolution, 18 Jour. of Public Law, 338,351 (1969).

549 - Under the principle of variability embodied in the reasonable use version of the riparian doctrine the first riparian owner to take water from a lake or stream may have to curtail his withdrawals if another riparian owner begins to exercise his riparian privileges. (See p. 16, ante.) And the second use will be lawful if reasonable even though it causes substantial harm to the prior user. (See fn. 233, ante.) One of the purposes of the Harmful Use Bill is to make it certain that this aspect of the reasonable use version of the riparian doctrine will be adhered to in New York. (See pp. 55 & 66 & fn. 443, ante.)

*** There are no footnotes 550-559.

560 - As the decision in a suit between riparian owners to determine the extent of their several riparian privileges and rights is arrived at by balancing their conflicting claims, (4 Torts Restat., p. 350 (1939); Prosser on Torts (3d ed.) 622 (1964)), it follows not only that the plaintiff may attack the reasonableness of the defendant's activity or claim, but that the defendant may question the reasonableness of the plaintiff's activity or claim. *Lawrie v. Silsby*, 82 Vt. 505, 74 A. 94,6 (1909); See *Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Authority*, 145 Me. 35, 71 A.(2d) 520, 525-7 (1950); *In re Metropolitan Util. Dist. of Omaha*, 179 Neb. 783, 140 N.W.(2d) 626,634 (1966); *Joslin v. Marin Municipal Wat. Dist.*, 67 Cal.(2d) 132, 60 Cal.Rptr. 377, 429 P.(2d) 889 (1967); *Morreale Hanks*, *Law of Water in N.J.*, 22 Rutgers L.R. 621,673,678,685 (1968); & Note, 79 Yale L.J. 102,3 (1969).

561 - 72 N.Y. 39 (1878).

562 - It is conceivable that the court's characterization of the plaintiff's use as unlawful was an inadvertence, or that the presence in the report at this point of the word "unlawfully" was due to the failure to correct a typographical error; for there was obviously nothing unlawful in the plaintiff's taking advantage of the higher level of water in his well for as long as it existed, even though it was due to the embankment around the spring on defendant's land.

563 - 72 N.Y. 39, 44-5 (1878).

564 - 23 Barb. 444 (N.Y.Sup.Ct.,1856).

- 565 - While it is conceivable that the defendant might have thought that he was serving such a purpose when he cut through the embankment, no such action on his part was necessary to protect himself against the acquisition by the plaintiff of a prescriptive right to have the water in his well remain at the higher level. The existence in the person against whom the prescriptive right is claimed of a cause of action by resort to which he could break the continuity of the prescriptive use is essential to the creation of the prescriptive right (see p. 15, ante); and since the plaintiff's enjoyment of the higher level was lawful (fn. 562, ante), the defendant had no cause of action against him. The interest which the plaintiff might have attempted to claim by prescription would have been a negative easement - a right that the condition on the defendant's land should not be altered (Prop. Restat., sec. 452 (1944)); but it is well settled that because of the prerequisite to prescription above referred to a negative easement cannot be acquired by prescription. See Prop. Restat., sec. 458, com. e (1944). However, since negative easements may be created by estoppel - by expenditures made in reliance upon a representation express or implied of the permanence of a condition (3 Tiffany on Real Prop. (3d ed.) 147, 4 id. 597 (1939); 3 Powell on Real Prop. 436 (1952); Natural Soda Products Co. v. City of Los Angeles, 23 Cal.(2d) 193, 143 P.(2d) 12 (1943); Naimich v. Wardlow, 362 Mich. 198, 106 N.W.(2d) 770 (1961)), it could have been suggested that the defendant's motive in cutting the ditch was good because he was seeking to prevent the plaintiff from assuming that the embankment was permanent and from making the expenditures in reliance on that assumption which would be necessary to the perfection of an estoppel. (Tiedeman v. Village of Middleton, 25 Wis.(2d) 443, 130 N.W.(2d) 783 (1964).)
- 566 - In Auburn & Cato Plank-Road Co. v. Douglass, 9 N.Y. 444, 449-450, 454 (1854) the court was so sure that defendant's malice could not render him liable for a harmful act which would have been lawful except for malice, that it decided that it was unnecessary to pass on the validity of his claim that he had been actuated by a good motive.
- 567 - Any doubt that may have once existed as to whether the basis of defendant's liability in Forbell was its use of the water on land other than the tract through which it was drawn has been dispelled by Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 341; 87 N.E. 504 (1909); Dunbar v. Sweeney, 230 N.Y. 609, 130 N.E. 913 (1921); and Victor A. Harder Realty Co. v City of N.Y., 64 N.Y.S.(2d) 310 (N.Y.Sup.Ct., 1946).
- 568 - 164 N.Y. 522, 6; 58 N.E. 644, 51 LRA 695 (1900).
- 569 - 3 N.Y.(2d) 583, 589-90; 148 N.E.(2d) 132, 170 N.Y.S.(2d) 789 (1958).
- 570 - 236 N.Y. 80, 140 N.E.(2d) 203, 27 ALR 1141 (1923).

- 571 - "The Beardsley decision rejects the idea that the motive is immaterial if the act be lawful, since a concurring opinion to that effect, in Beardsley, represented the view of one Judge only." - Reinforce, Inc. v. Birney, 308 N.Y. 164,170; 124 N.E.(2d) 104 (1954).
- 572 - Thus the court said (236 N.Y. 80,88-9; 140 N.E.(2d) 203, 27 ALR 1141 (1923)); "Even if we should adopt the view taken by plaintiff that the evidence discloses injury to him by an act perfectly legitimate in itself but dictated solely by malicious and unlawful purpose, his position would not be entirely free from difficulty under the decisions of our state. There are cases which state the rule to be that a lawful act is not made unlawful and actionable because there is a malicious and reprehensible purpose behind it. (Auburn & Cato Plank Road v. Douglass, 9 N.Y. 444; Phelps v. Nowlen, 72 N.Y. 39; Kiff v. Youmans, 86 N.Y. 324.) An examination of these cases, however, does disclose that in some of them at least the proposition thus stated was not strictly necessary to a decision of the case".
- 573 - Such as the prima facie tort cases cited in 42 St. John's L.R. 530 (1968).
- 574 - Ames, How Far an Act May be a Tort Because of the Wrongful Motive of the Actor, 18 Harv.L.R. 411 (1905); Prosser on Torts (3d ed.) 24-5 (1964).
- 575 - 46 N.Y. 511, 7 Am.Rep. 373 (1871).
- 576 - Although the farmer was the defendant in the action, it seems proper to classify Clinton as a case involving the effect on a plaintiff's right of his malice toward the defendant, because the farmer, though resorting to self-help rather than to suit, was attempting to enforce his alleged riparian right against the mill owner. In other words, the case is the same for the purpose in hand as if the farmer had brought an action for an injunction requiring the mill owner to remove the dam.
- 577 - Discussion of this aspect of Clinton can be found at pp. 83-5, ante.
- 578 - 46 N.Y. 511, 520; 7 Am.Rep. 373 (1871).
- 579 - 46 N.Y. 511,520; 7 Am.Rep. 373 (1871).
- 580 - In Phelps v. Nowlen, 72 N.Y. 39 (1878), discussed at p. 113, ante, the Court of Appeals was more free to hold that the defendant was not guilty of malice; for the finding of the trial court as to malice was in the following ambiguous terms: "that in so far as such intent and purpose (to lower the water in plaintiff's well)...can constitute malice, his motive was malicious." (p. 41.)
- 581 - 72 N.Y. 575 (1878). The holding in this case was expressly approved in Farmers' Loan & Trust Co. v. N.Y. & Nor. Ry. Co., 150 N.Y. 410, 432; 44 N.E. 1049 (1896), but not followed because plaintiff stood in a trust relationship with minority stockholders.

- 582 - 72 N.Y. 575,577-8 (1878).
- 583 - 62 Hun 306, 17 N.Y.S. 210 (Genl. Term, 1891).
- 584 - See p. 10 & fns. 194, 196, & 240, ante.
- 585 - 62 Hun 306,312; 17 N.Y.S. 210 (Genl. Term, 1891).
- 586 - See, for example, *Beardsley v. Kilmer*, 236 N.Y. 80,6; 140 N.E. 203, 27 ALR 1141 (1923) and *Benton v. Kennedy-Van Saun Mfg. Corp.*, 2 A.D. (2d) 27,9; 152 N.Y.S.(2d) 955 (1956) in which the court said:
 "Defendant's self-interest negatives malice, even though the means employed might be of questionable morality and ethical validity. Competition as such, no matter how vigorous or even ruthless, is not a tort at common law."
- 587 - Evidence of the continued vitality which is nevertheless enjoyed by the Clinton pronouncement that a party's actuation by malice toward his adversary cannot prevent his enforcement of his right is afforded by its citation in the relatively recent cases of *Caliendo v. McFarland*, 13 Misc. (2d) 183,191; 175 N.Y.S.(2d) 869 (Sup.Ct., 1958) and *C.H.O.B. Associates, Inc. v. Brd. of Assessors*, 45 Misc.(2d) 184,8; 257 N.Y.S. (2d) 31 (Sup.Ct.,1964); *affd. w.o.*, 22 A.D.(2d) 1015, 256 N.Y.S. (2d) 550 (1964); *affd. w.o.*, 16 N.Y.(2d) 779, 209 N.E.(2d) 820, 262 N.Y.S. (2d) 501 (1965).
- 588 - At pp. 114-5, ante.
- 589 - 42 Misc.(2d) 855, 249 N.Y.S.(2d) 256 (Sup.Ct., 1964).
- 590 - 42 Misc.(2d) 855,9, 249 N.Y.S.(2d) 256 (Sup.Ct., 1964).
- 591 - 42 Misc.(2d) 855,860; 49 N.Y.S.(2d) 256 (Sup.Ct.,1964).
- 592 - 4 Torts Restat. xvi-xix (1939); *Prosser on Torts* (3d ed.) 621-3 (1964).
- 593 - See the cases cited in 42 St. John's L.R. 530, 534-5 (1968).
- 594 - See p. 117-8, ante.
- 595 - 78 Me. 445, 6 A. 868 (1886).
- 596 - 78 Me. 445, 451-2; 6 A. 868 (1886).
- 597 - 91 Me. 221, 39 A. 552 (1898).
- 598 - 246 Mass. 444, 141 N.E. 119, 29 ALR 1319 (1923).
- 599 - 237 Mass. 385,390; 130 N.E. 48, 13 ALR 928 (1921).
- 600 - *Haber & Bergen, Law of Water Allocation in the Eastern U.S.* (chap. by Haar & Gordon) 5 (1958).

- 601 - 237 Mass. 385,387-390; 130 N.E. 48, 13 ALR 928 (1921).
- 602 - In Tillson v. Cranebrook Co., 215 Mass. 337, 146 N.E. 671 (1925) the court held for the defendant because there was no evidence of its malice; but a reasonable implication from the opinion as a whole is that if malice had been shown, it would have been deemed relevant provided it supplied defendant's predominant though not its sole motive.
- 603 - 283 Mass. 27,31-2; 186 N.E. 78 (1933).
- 604 - Robitaille and other Mass. cases seem to have been so interpreted in Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action, 32 Corn.L.Q. 465,474-5,481-2 (1957).
- 605 - See p. 115, ante.
- 606 - 89 Minn. 58, 93 N.W. 907, 60 LRA 875 (1903).
- 607 - 89 Minn. 58,63; 93 N.W. 907, 60 LRA 875 (1903).
- 608 - 107 Minn. 145, 119 N.W. 946, 22 LNS 599 (1909).
- 609 - See p. 115, ante.
- 610 - Kinyon, What Can a Riparian Proprietor Do?, 21 Minn.L.R. 512,525 (1937); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.(2d) 174,182 (1944).
- 611 - Sec. 853, com. d (1939).
- 612 - See pp. 62-5, ante.
- 613 - 25 Pa. 528,533 (1855).
- 614 - Thus suggesting a basis for a distinction between a riparian rights case and a debtor-creditor case in which the creditor can collect though he acts "out of pure enmity". See Jenkins v. Fowler, 24 Pa. 308 (1855) and Morris v. Tuthill, discussed at pp. 117-8, ante.
- 615 - See p. 92 & fn. 450, ante.
- 616 - See Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.(2d) 403 (1956); Stehley v. Russell, 201 Pa. Super. 534, 193 A.(2d) 669 (1963).
- 617 - Whether in Adams v. Grigsby, 152 So.(2d) 619 (La.App.); cert.den., 244 La. 662, 153 So.(2d) 880 (1963) the court took the position that although unlimited withdrawal of percolating water is permitted in Louisiana, a defendant would be liable for a withdrawal made for the purpose of harming the plaintiff is not clear; but the opinion would appear to be capable of such an interpretation.

- 618 - See pp. 112-122, ante.
- 619 - And if it is true that the law in this regard is uncertain in Me., Mass., Minn. & Pa. as assumed by the author (see pp. 122-9, ante) enactment of clarifying legislation in those states would seem to be desirable; and in any other eastern state in which the same uncertainty exists.
- 620 - See comment on *Phelps v. Nowlen*, pp. 113-4, ante; *Clinton v. Myers*, pp. 116-7, ante; *Morris v. Tuthill*, pp. 117-8, ante; *Townsend v. Bell*, pp. 118-9, ante; and *Stillwater Water Co. v. Farmer*, pp. 128-9, ante.
- 621 - See comment on *Beardsley v. Kilmer*, p. 115, ante; *Great Atlantic and Pacific Tea Co., Inc. v. N.Y. World's Fair 1964-1965 Corp.*, pp. 120-2, ante; *Stevens v. Kelley*, pp. 122-4, ante; *Taft v. Bridgeton Worsted Co.*, pp. 124-7, ante; *Stillwater Water Co. v. Farmer*, pp. 128-9, ante; *Tuttle v. Buck*, pp. 128-9, ante; and *Wheatley v. Baugh*, p. 129, ante.
- 622 - See comment on *Forbell v. City of N.Y.* and *Kossoff v. Rathgeb-Walsh, Inc.*, pp. 114-5, ante; *Lord v. Langdon*, pp. 124, ante; *Taft v. Bridgeton Worsted Co.*, pp. 124-7, ante; and *Robitaille v. Morse*, pp. 127-8, ante.
- 623 - "Many of the older cases laid down a broad rule to the effect that the motive is immaterial if the act itself is lawful, and that an act otherwise lawful is not changed into an unlawful act, giving rise to a cause of action, because the motive of the person doing it is malicious or unjustifiable. Even now statements are frequently made by the courts to this broad general effect...those generalizations are of little value in determining concrete cases. It may be conceded that the motive with which the act is done will not convert a lawful into an unlawful act. But the question is, What is a lawful act? Is one exercising a lawful right when he engages in a business solely for the purpose of injuring or ruining another who is already engaged in that line of business, and not with any intention of continuing the business longer than to accomplish that purpose?" - 27 ALR 1417,8 (1923). "Out of this older law there has survived the statement, repeated frequently by the courts,...that 'Malicious motives make a bad case worse, but they cannot make that wrong which is in its essence lawful.' This of course merely begs the question, since unless motive is to be eliminated altogether, it must be taken into account in determining whether the act is 'in its essence lawful' in the first place." - Prosser on Torts (3d ed.) 24 (1964).
- 624 - "The early common law took little account of a defendant's motives. 'Malicious motives make a bad case worse, but they cannot make that wrong which is its own essence lawful.' But with the development of modern law, the motive for man's actions took on greater significance. Complex relationships, coupled with a need to balance conflicting

interests, demanded an evaluation of one's motives in order to differentiate for the purposes of liability." - Note, 42 St. John's L.R. 530,4 (1968).

- 625 - "When the more modern law began to inquire into the character of the defendant's conduct, however, and to base liability upon his immediate intent to interfere with the interest of the plaintiff, it was inevitable that his underlying motives should be called into play. With recognition that the interests of the parties are to be weighed against one another has come a realization that the actor's state of mind may be an important factor in the scale. Accordingly in many situations where the interests involved are more nicely balanced, and the rights and privileges of the parties are not fixed by definite rule but are interdependent and relative, the defendant's motive or purpose may in itself determine whether he is to be held liable. One conspicuous example of this is found in the field of nuisance, where the reasonableness of an interference with the plaintiff's use or enjoyment of his land may depend upon the defendant's motive in causing it. Thus the erection of a spite fence, with no other purpose than the vindictive one of shutting off the plaintiff's view, or his light and air, is now held by most courts to be actionable as a nuisance, where the same fence serving some useful purpose would not." - Prosser on Torts (3d ed.) 25 (1964).
The statements quoted would, of course, seem to be applicable to cases involving riparian privileges and rights, since the law governing them is a subdivision of the field of nuisance. (4 Torts Restat. 314-5 (1939).)
- 626 - *Camfield v. U.S.*, 167 U.S. 518,523-4; 17 S.Ct. 866, 42 L.Ed. 261 (1896).
- 627 - Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 *Corn.L.Q.* 465,479 (1957); Note, 42 St. John's L.R. 530,9 (1968).
- 628 - 81 Mich. 52,5; 45 N.W. 381, 8 LRA 183 (1890).
- 629 - 148 Mass. 368,373; 19 N.E. 390, 2 LRA 81 (1889).
- 630 - 104 Me. 122, 71 A. 472 (1908).
- 631 - The difficulty of determining whether or not a party is primarily actuated by malice would appear to be no greater than the difficulty of making other determinations which the law continues to require, such as the determination of reasonable doubt, reasonable diligence, and preponderance of evidence. See *Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.(2d) 5 (1933). For evidence that a satisfactory determination as to whether a party was actuated primarily by malice can be arrived at after careful analysis of the facts see *Gallagher v. Dodge*, 48 Conn. 387, 40 Am.Rep. 182 (1880).

- 632 - Torts Restat., sec. 851 (1939); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); City of N.Y. v. Blum, 208 N.Y. 237, 101 N.E. 869 (1913); Kasuba v. Graves, 109 Vt. 191, 194 A. 455 (1937) & Harris v. Brooks, 225 Ark. 436, 283 S.W. (2d) 129, 54 ALR (2d) 1440 (1955).
- 633 - This rule is followed regardless of whether the jurisdiction adheres to the natural flow or the reasonable use version of the riparian doctrine. (5 Powell on Real Prop., sec. 712 (1968).)
- 634 - For the text see p. 217-220, post.
- 635 - This implication is inconformity with the express declaration to that effect in subd. (1) of proposed sec. 429-k.
- 636 - For the text of these subparagraphs see pp. 218 & 219, post. As to the need for legislation clarifying the law on these points see pp. 97-132, ante.
- 637 - Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Haar & Gordon) 5 (1958); Maloney, Plager & Baldwin, Water Pollution, 20 Un. of Fla.L.R. 131,6 (1967). Red River Roller Mills v. Wright, 30 Minn. 249,253 (1883); Parker v. American Woolen Co., 195 Mass. 591, 81 N.E. 468 (1907).
- 638 - Fulton County Gas & Elec. Co. v. Rockwood Mfg. Co., 238 N.Y. 109,115; 144 N.E. 359 (1924) and other authorities cited in fn. 55, ante.
- 639 - Elliott v. Fitchburg Rr. Co., 64 Mass. 191,4 (1852); Clinton v. Myers, 46 N.Y. 511, 518-520; 7 Am.Rep. 373 (1871); Timm v. Bear, 29 Wis. 254,266,7 (1871); Gehlen v. Knorr, 101 Ia. 700, 70 N.W. 757,8 (1897); Strobel v. Kerr Salt Co., 164 N.Y. 303,315; 58 N.E. 142 (1900); Davis v. Town of Harrisonburg, 116 Va. 864, 83 S.E. 401 (1914); Kasuba v. Graves, 109 Vt. 191, 194 A. 455 (1937); Michelson v. Leskowitz, 55 N.Y.S.(2d) 831 (Sup.Ct., 1945); affd., 270 A.D. 1042, 63 N.Y.S.(2d) 191 (1946); Taylor v. Tampa Coal Co., 46 So.(2d) 392 (Fla.Sup.Ct.,1950); Florio v. State of Fla. ex rel. Epperson, 119 So.(2d) 305, 80 ALR(2d) 1117 (Fla.Ct. of App., 1960); Bollinger v. Henry, 375 S.W.(2d) 161,6 (Mo.Sup.Ct.,1964); Note: 79 Yale L.J. 102, 103-4 (1969).
- 640 - The weight of authority, including N.Y., permits consideration of custom as bearing on suitability to the region and the body of water. (Snow v. Parsons, 28 Vt. 459 (1856); Dumont v. Kellogg, 29 Mich. 420, 18 Am.Rep. 102 (1874); Prentice v. Geiger, 74 N.Y. 341,6 (1878); Red River Roller Mills v. Wright, 30 Minn. 249,253 (1883); White v. Whitney Mfg. Co., 60 S.Car. 254, 38 S.E. 456,461 (1901); Hazard Powder Co. v. Somerville Mfg. Co., 78 Conn. 171, 61 A. 519,521 (1905); Mason v. Whitney, 193 Mass. 152, 78 N.E. 881,3; 7 LNS 289 (1906). But a small minority is contra. (Hayes v. Waldron, 44 N.H. 580,7; 84 Am.Dec.105 (1863); Timm v. Bear, 29 Wis. 254, 269-270 (1871).)

- 641 - *Snow v. Parsons*, 28 Vt. 459 (1856); *Dumont v. Kellogg*, 29 Mich. 420, 18 Am.Rep. 102 (1874); *Bullard v. Saratoga Victory Mfg. Co.*, 77 N.Y. 525 (1879); *Red River Roller Mills v. Wright*, 30 Minn. 249, 254-6 (1883); *Pa. Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886); *Gehlen v. Knorr*, 101 Ia. 700, 70 N.W. 757, 8 (1897); *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 320; 58 N.E. 142 (1900); *Turner v. James Canal Co.*, 155 Cal. 82, 99 P.520, 5 (1909); *Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co.*, 101 Conn. 310, 125 A. 623 (1924); *Michelson v. Leskowitz*, 55 N.Y.S.(2d) 831 (Sup.Ct., 1945); *affd.*, 270 A.D. 1042, 63 N.Y.S.(2d) 191 (1946); *Montgomery Limestone Co. v. Bearden*, 256 Ala. 269, 54 So.(2d) 571, 4 (1951); *Kistler v. Watson*, 79 Oh.L.Abst. 552, 156 N.E.(2d) 883 (1957).
- 642 - *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913). So harmful diversion or pollution of a body of water by a municipality is usually held unlawful, though the financial loss to the municipality represented by the cost of procuring a water supply or the privilege of sewage discharge by eminent domain far exceeds the financial loss which the plaintiff would suffer if he were refused relief. See pp. 78-9 & fn. 373, ante.
- 643 - *Snow v. Parsons*, 28 Vt. 459 (1856); *Gould v. Boston Duck Co.*, 13 Gray 443, 453 (Mass.Sup.Ct., 1859); *Timm v. Bear*, 29 Wis. 254, 265, 6 (1871); *Bullard v. Saratoga Victory Mfg. Co.*, 77 N.Y. 525 (1879); *Red River Roller Mills v. Wright*, 30 Minn. 249, 254-5 (1883); *Pa. Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886); *Barnard v. Sherley*, 135 Ind. 547, 24 LRA 568 (1893); *Hazard Powder Co. v. Somerville Mfg. Co.*, 78 Conn. 171, 61 A. 519, 521 (1905); *City of N.Y. v. Blum*, 208 N.Y. 237, 101 N.E. 869 (1913); *Fewell v. Catawba Power Co.*, 102 S.Car. 452, 86 S.E. 947, 950 (1915); *Sandusky Portland Cement Co. v. Dixon Pure Ice Co.*, 221 F. 200, 4 (1915); *State v. Apfelbacher*, 167 Wis. 233, 167 N.W. 244 (1918); *Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co.*, 101 Conn. 310, 125 A. 623 (1924); *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.(2d) 738, 746 (1966) - dual system state. *Worthen & Aldrich v. White Spring Paper Co.*, 74 N.J.Eq. 647, 70 A. 468 (Ch., 1908), *affd.*, 75 N.J. Eq. 624, 78 A. 1135 (Err. & App., 1909) is criticized in Morreale Hanks, *Law of Water in N.J.*, 22 Rutgers L.R. 621, 677 (1968) for taking a contrary position.
- 644 - *City of Valparaiso v. Hagen*, 153 Ind. 337, 54 N.E. 1062, 3; 48 LRA 707 (1899); *Henderson Estate Co. v. Carroll Elec. Co.*, 113 A.D. 775, 8; 99 N.Y.S. 365 (1906); *affd.w.o.*, 189 N.Y. 531, 82 N.E. 1117 (1907); *Davis v. Town of Harrisonburg*, 116 Va. 864, 83 S.E. 401, 3 (1914) - by implication. For comment on the pertinent Mich. cases see Haber & Bergen, *Law of Water Allocation in the Eastern U.S.* (chap. by Arens) 384-5 (1958) and Plager, *Law of Water Allocation*, 1968 Wis.L.R. 673, 687.

- 645 - Martz, Water for Mushrooming Populations; 62 W.Va.L.R. 1,11 (1959); Strobel v. Kerr Salt Co., 164 N.Y. 303,315; 58 N.E. 142 (1900); Obrecht v. Nat'l. Gypsum Co., 361 Mich. 399, 419; 105 N.W.(2d) 143 (1960); Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.(2d) 738,745-7 (1966). While this factor is not of itself determinative under the riparian doctrine of superiority of right (see authorities cited in fn. 292, ante) as it is under the prior appropriation doctrine, the weight given to it in riparian doctrine states is greater than is generally supposed. (Beuscher, Appropriation Water Law Elements in Riparian Doctrine States, 10 Buf.L.R. 448,451,3 (1961); Meyers, 77 Yale L.J. 1036,1050 (1968).) This practice has been defended on the ground that it has a tendency to encourage investment in water-connected projects. (Haber & Bergen, Law of Water Allocation in the Eastern U.S. (Chap. by Fisher) 480 (1958).)
- 646 - For the text of this subdivision see p. 220, post.
- 647 - See in addition to the cases cited in fns. 283 and 560, ante, Gould v. Boston Duck Co., 13 Gray 443,453 (Mass.Sup.Ct., 1859) & Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co., 101 Conn. 310, 125 A. 623 (1924).
- 648 - Strobel v. Kerr Salt Co., 164 N.Y. 303,320; 58 N.E. 142 (1900); United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N.Y. 38,45; 123 N.E. 200 (1919). See also as to equality of right fn. 293b, ante. "The determination of reasonableness...requires a comparison of competing uses. This meaning of reasonableness which recognizes the equality of right in a correlative sense has been generally adopted in the Eastern United States." - Lauer, Reflections on Riparianism, 35 Mo.L.R. 1,10 (1970).
- 649 - 4 Torts Restat., p. 350 (1939); Prosser on Torts (3d ed.) 622 (1964); and authorities cited in fn. 560, ante.
- 650 - For the text of this subdivision see p. 220, post.
- 651 - Kennebunk, Kennebunkport & Wells Water Dist. v. Me. Turnpike Authority, 147 Me. 149, 84 A. (2d) 433 (1951); Sund v. Keating, 43 Wash. (2d) 36, 259 P.(2d) 1113 (1953); McKell v. Spanish Fork City, 6 Utah (2d) 92, 305 P.(2d) 1097 (1957); Hayes Creek Country Club, Inc. v. Central Penn Quarry etc. Co., 407 Pa. 464, 181 A.(2d) 301 (1962); Drogan Wholesale Elec. Supply Co., Inc. v. State of N.Y., 27 A.D. (2d) 763, 276 N.Y.S.(2d) 1015 (1967).

It would seem clear that any person who causes harm by negligently altering a body of water or by negligently conducting an activity connected with a body of water should be liable for such harm. As the circumstances which are considered when the trier of the facts passes on the question of negligence are very similar to those which are considered when passing on the question of the reasonableness of an alteration of or activity in connection with a body

of water, continued adherence to the common law rule as to liability for negligence is not likely to involve any conflict with the letter or spirit of proposed secs. 429-k and 429-m of the Harmful Use Bill which, if enacted, would permit harmful alterations in and activities in connection with lakes and streams to the extent that such alterations and activities are reasonable.

Thus among the circumstances taken into account when deciding whether or not a defendant has been guilty of negligence are the following. Did the defendant's conduct involve a risk of harm to others which was unreasonable in view of the social value of his activity and of the interests of others jeopardized thereby, and in view of the extent of the harm which his activity was likely to cause to other persons? Could the defendant's purpose have been adequately served by resort to less dangerous methods? Was the defendant's conduct sanctioned by custom, which would have a bearing on the suitability of defendant's conduct to the region or to the body of water in question. (See p. 134, ante.) It will be noted that the circumstances stressed by these questions are the substantial counterparts of those listed in pars. (a), (b), (c), and (d) of subd. (1) of proposed sec. 429-m. For the text of these pars. see pp. 218-9, post.

The resemblance between the circumstances considered when passing upon questions of negligence and reasonableness of alterations of bodies of water or of activities in connection therewith will be more fully revealed by a careful comparison of Torts Restat. (2d), secs. 289-296 (1965) with Torts Restat., secs. 825-833 & 849-863 (1939). If it be borne in mind that many violations of riparian rights are non-trespassory and are therefore classifiable as nuisances, the following quotation from *Waters v. McNearney*, 8 A.D.(2d) 13,15; 185 N.Y.S.(2d) 29 (1959); affd.w.o., 8 N.Y. (2d) 808, 168 N.E.(2d) 255, 202 N.Y.S.(2d) 24 (1960) will be found to testify to the close relation between the determination of reasonableness and negligence: "Nuisance, whether based on negligence or not involves the reasonableness of the conduct involved." as does the statement in *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40,9; 81 N.E.549, 13 LNS 465 (1907) that "...since a negligent use of one's property to the injury of another is an unreasonable use, the ultimate question after all is whether the use is reasonable." Also pointing in the same direction is the following statement from the opinion in *Kennebunk* cited in the first par. of this fn.: "In our former opinion...we recognized the principle that although a use of its land by an upper proprietor may in and of itself be a reasonable use, the manner of its use may be so negligently conducted that it becomes unreasonable as against the rights of the lower riparian proprietor." See also in the same vein *Prosser on Torts* (3d ed.) pp. 149 & 602 (1964), where it is said: "Negligence already has been defined as conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm... In the light of the recognizable risk, the conduct, to be negligent,

must be unreasonable." "Where the basis of nuisance is negligence, the reasonableness of the defendant's conduct is obviously in issue, and is determined by the familiar process of weighing the gravity and probability of the risk against the utility of his course. But the same balance of interests is called into play when the interference is an intentional one. Each defendant is privileged, within reasonable limits, to make use of his own property or to conduct his own affairs at the expense of some harm to his neighbors...It is only when his conduct is unreasonable, in the light of its utility and the harm which results, that it becomes a nuisance." Moreover, the fact that some courts have talked in terms of negligence when, because the harm inflicted by the defendant could be classified as intentional, as in *Red River Roller Mills v. Wright*, 30 Minn. 249 (1883), it might have been better to talk in terms of reasonableness (Torts Restat., sec. 828, com. g (1939); 5 Powell on Real Prop. 332,n. 33 (1968); *Waters v. McNearney*, supra, this fn.) affords further evidence of the closeness of the relation under consideration.

652 - See pp. 1-5 & 55, ante.

653 - Ample precedent for including provisions codifying existing law in legislation which effects needed clarification and introduces changes is afforded by the statutes prepared by the National Conference of Commissioners on Uniform State Laws. Two facts do much to justify this practice: (1) that "pretrial settlement of the vast majority of civil and criminal cases is an administrative prerequisite for keeping the courts of this country open" (Howard, *Adjudication Considered as a Process of Conflict Solution*, 18 Jour. of Public Law 338,9 (1969)); and (2) that pretrial settlements are more likely to be arrived at if each of the contesting parties has ready access to authoritative information as to the law applicable to their controversy.

654 - One text which cannot be criticized on this ground is the Torts Restatement. See illus. 2 to sec. 832, illus. 2 to sec. 833 & secs. 850 & 859 (1939).

655 - Torts Restat., com. b to sec. 850 (1939).

656 - See pp. 6-7, ante.

657 - For the text of sec. 429-o see pp. 220-1, post.

658 - That it is a trespass at common law for a person to cross the riparian land of another without his consent to obtain access to a body of water see *Maloney & Plager, Florida's Lakes*, 13 Un. of Fla.L.R. 1,56 (1960); *Glessner, Riparian Water Law - Lakeshore Developments*, 1966 Wis.L.R. 172, 180; *Waite, A Four State Comparative Analysis of Public Rights in Water*, 5 (1967); Note, *Fishing & Recreational Rights in Iowa Lakes and Streams*, 53 Ia.L.R. 1322, 1343-4 (1968); *Wetmore v. Atlantic White Lead Co.*, 37 Barb. 70, 94 (Genl. Term, N.Y.Sup.Ct.,1862).

That it is probably a trespass under New York common law for a person, even though he be a riparian owner, to intrude upon the part of the bed of a non-navigable lake or stream owned by another without his consent, see the dicta in several New York cases, including *Commonwealth Water Co. v. Brunner*, 175 A.D. 153, 162; 161 N.Y.S. 794 (1916) and other cases listed in 35 N.Y. Un.L.R. 1377, 1380, fn. 18 (1960), if the bed of the body of water with respect to which privileges of boating, fishing and swimming are claimed is privately owned, such privileges would be exercisable by a riparian claiming them only on or in such part of the body of water as lay over bed which he owned, even if the water is navigable, unless the exercise of recreational privileges is included in the navigation easement. That it is not certain that it is in New York, see fn. 862, post. Among the many collections of authorities in accord with and contra to these New York dicta are those found in 9 Un. of Kan.L.R. 91 (1960); 14 Rutgers L.R. 837 (1960); Reis, *Policy & Planning for Recreational Use of Inland Waters*, 40 Temp.L.Q. 155, 173-180 (1967).

An important reason for taking the position that a person should not be able to justify his entry in person or by agent on the riparian land of another without his consent, or on the lake or stream bed of another without his consent, even though such entry causes no harm, by showing that except for the trespassory nature of the entry it would have been reasonable, is the widely entertained and deeply rooted conviction previously referred to (see pp. 137, 138, ante) that a landowner should be as completely secure in the possession of his land as is consistent with the common good, and that the security of possession of individual landowners is in the long run not only consistent with but in furtherance of the common good. Entries without consent, when effected in person, would, if unchecked, constitute a particularly serious threat to the landowner's desire for privacy and security. As to the tenacious vitality of the claim that a man's house is his castle, see Mechem, *The Peasant in His Cottage*, 28 Son. Cal.L.R. 139 (1955).

The considerations which support the view that a person should not be able to justify his harmful flooding of the land of another without his consent by showing that except for the trespassory nature of the act it would have been reasonable, are referred to at pp. 87-8, ante.

*** There are no footnotes 659-660.

661 - For the exact wording of this provision see p. 221, post.

662 - See p. 23, ante.

663 - Environmental Conservation Law, secs. 15-0501 to 15-0515.

664 - Public Health Law, arts. 11, 12 & 13.

- 665 - Since this legislation clearly indicates that the Legislature believes that the conduct prescribed thereby is unreasonable, such an outcome would be undesirable as in conflict with the public policy laid down by valid exercises of the police power. For other considerations which could be advanced in justification of the protection by exceptive provision of existing governmental rights see pp. 40-2, ante, where the desirability of the similar exceptive provision in sec. 15-0701, subd. (8) is discussed.
- 666 - For reasons why governmental bodies should not escape the liability to which they are subject at common law for harmful diversion and pollution of lakes and streams see pp. 79 & 108, ante.
- 667 - See p. 32, ante.
- 668 - *Mayor of Paterson v. East Jersey Water Co.*, 74 N.J.Eq. 49, 70 A. 472 (ch., 1908); *affd.*, 77 N.J.Eq. 588, 78 A. 1134 (Er. & App., 1910); *Roberts v. Martin*, 72 W.Va. 92,9; 77 S.E. 535 (1913); *Town of Purcellville v. Potts*, 179 Va. 514, 524; 19 S.E.(2d) 700 (1942).
- 669 - 3 *Tiffany on Real Prop.* (3d ed.) 124 (1939); VI-A *Amer.L.Prop.* 162 & 164 (1954); 5 *Powell on Real Prop.* 375-6 (1968); 34 *N.Car.L.R.* 247 (1956); *Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 *Wyo.L.J.* 1,2 (1957).
- 670 - *Garwood v. N.Y.C. & H.R.Rr. Co.*, 83 N.Y. 400,7 38 *Am.Rep.* 452 (1881); *Knauth v. Erie Rr. Co.* 219 A.D. 83, 219 N.Y.S. 266 (1926).
- 671 - See authorities cited in fn. 669, ante; *Haber & Bergen, Water Allocation in the Eastern U.S.*, (chap. by Fisher) 481 (1958); *Morreale Hanks, Law of Water in N.J.*, 22 *Rutgers L.R.* 621,630 (1968).
- 672 - See p. 31, ante.
- 673 - One of the few states in this group is New Hampshire. See *Gillis v. Chase*, 67 N.H. 161,31 A. 18 (1891). That Iowa has adopted the N.H. rule by statute see *O'Connell, Iowa's New Water Statute*, 47 *Ia.L.R.* 549,632 (1962).
- 674 - 3 *Tiffany on Real Prop.* (3d ed.) 123 (1939); *O'Connell, Iowa's New Water Statute*, 47 *Ia.L.R.* 549,626 (1962); *Reis, Conn. Water Law* 48 (1967); *Sax, Water Law, Planning & Policy* 1 (1968); *Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S.*, 43 *Ind.L.J.* 383,395 (1968); *Garwood v. N.Y. Central & Hudson River Rr. Co.*, 83 N.Y. 400, 38 *Am.Rep.* 452 (1881); *Crawford Co. v. Hathaway*, 67 *Neb.* 325,353; 93 *N.W.* 781, 790 (1903); *Kelly v. Nagle*, 150 *Md.* 125, 132 A. 587,593 (1926); *Thompson v. Enz*, 379 *Mich.* 667, 154 *N.W.* (2d) 473,484 (1967).
- 675 - 150 *Cal.* 520,6; 89 *P.* 338 (1907).

- 676 - 186 Cal. 231, 199 P. 325,7 (1921).
- 677 - Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1, 11 (1959); Lee, Acquisition of Riparian Rights in N.Y., 1964 Proceedings, Amer. Bar Assn., Section of Mineral & Natural Resources Law 13,14; Davis, Australian & Amer. Water Allocation Systems Compared, 9 Boston Coll. Ind. & Com'l.L.R. 647, 680 (1968); Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S., 43 Ind.L.J. 383 (1968). See also authorities cited in fns. 135 & 138, ante & in fns. 989,990 & 991, post.
- 678 - Such uncertainties are discussed at pp. 242-260, post.
- 679 - For the text of proposed sec. 429-1(e11) see pp. 216-7,post. The question as to whether the N.Y. legislature should enact a statute which would relax the common law restrictions on non-riparian use to an even greater extent than would sec. 429-1(e11), if adopted, is discussed at pp. 222-235,post.
- 680 - In Kates, Georgia Water Law at 70, 75 & 335 (1969) it is recommended that Georgia enact a statute applicable only to non-navigable streams but otherwise somewhat similar to sec. 429-1(e11) of the Harmful Use Bill.
- 681 - For reasons why a municipality should not have such a privilege see pp. 77-8 & 108-9, ante.
- 682 - It has been suggested that legalization of non-riparian use, though desirable on balance, would result in substantial diminution in stream flow and require that steps be taken to offset this by increasing the available supply. (Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1, 26, 45 (1959).) The risk of such consequences would appear to be present to some degree even if the non-riparian use were to be limited to that deemed reasonable under all the circumstances. In certain situations such consequences might be undesirable if they materialized before practicable means of augmenting the supply had been found, and would constitute a threat to the public interest in the maintenance of lake levels and stream flows as well as to the interest of third parties in the availability of water to satisfy their needs. The ability of the limitations on non-riparian use which would be imposed by the recommended legislation to diminish the risk of such consequences to the public as well as to third parties furnishes additional justification for their inclusion in any jurisdiction in which lake levels and stream flow are not sufficiently protected by other legislation requiring the maintenance of minimum levels and flows. See Davis, Australian & American Water Allocation Systems Compared, 9 Bost.Coll.Ind. & Com'l L.R. 647,686 (1968).
- 683 - See authorities cited in fn. 64b, ante.

- 685 - Hutchins, Selected Problems in the Water Law of the West 378 (1942); Water Resources & the Law 34 (1958); 5 Powell on Real Prop. 456 (1968).
- 686 - Hutchins, Selected Water Problems in the Water Law of the West 298 (1942); Trelease, Legal Contributions to Water Resources Development, Un. of Conn. Inst. of Water Resources, Report No. 2 at p. 6 (1967).
- 687 - See Trelease & Lee, Transfer of Water Rights, 1 Land & Water L.R. 1, 24-7, (1966) & City of Westminster v. Church, 167 Colo. 1, 445 P. (2d) 52,8 (1968). In Mann, Ellis & Krausz, Water-Use Law in Illinois 25 (1964) the authors suggest that if the Illinois courts were to allow a riparian owner to use water on non-riparian land, they might hold that the extent of such privilege would be determined by the extent of his privilege of use on his riparian land. This suggestion was not accompanied by any expression of doubt as to the practicability of such a determination. In Miller & Lux, Inc. v. J.G. James, Co., 179 Cal. 689, 178 P. 716 (1919) it was held that an express transfer of riparian privileges and rights along with a part of a riparian tract which part became non-riparian because it had no contact with the water after its transfer was good as against third parties who, the court pointed out had "the same right that they had before the transfer, neither more nor less". These conclusions inevitably imply that it is practicable to measure the extent of the riparian privileges and rights received by the transferee of the severed part of the tract by their extent in the hands of the transferor prior to its severance. Moreover, even if the measurement proves quite difficult, the courts should be directed to undertake it in view of the value of water privileges and rights and of the universal acceptance of the proposition that the public interest requires their transferability.
- 689 - See p. 5, ante.
- 690 - Trelease, Law, Water & People, 18 Wyo.L.J. 3, 7 (1963).
- 691 - If a particular non-riparian use were also an out-of-state use, it might constitute a violation of the legislation which has been enacted in some prior appropriation states imposing conditions upon or even prohibiting export of water. For references to legislation of this sort see 5 Powell on Real Prop. 462 (1968).
- 692 - See authorities cited in fn. 671, ante.
- 693 - See authorities cited in fn. 669 & 673, ante.
- 694 - State v. Apfelbacher, 167 Wis. 233, 167 N.W. 244 (1918) & Smith v. Stanolind Oil & Gas Co., 197 Okla. 499, 172 P.(2d) 1002,5 (1946). See also Wis.Stat., sec. 30.18(5) which authorizes a riparian owner to use water for agricultural purposes on non-riparian land contiguous to his riparian land, but imposes a quantitative limit.

- 695 - See also *Miller & Lux, Inc. v. J.G. James Co.*, 179 Cal. 689, 178 P. 716 (1919) holding that if A, the owner of a riparian tract, conveys a part to B which will have no contact with the water after the conveyance, a provision in the deed that B shall have riparian rights will be effective against other riparian owners. While it is true that the court also held that the riparian character of B's tract would be preserved by the provision, this holding is of debatable validity in view of the generally accepted rule that land cannot be riparian unless it has contact with the water. (Torts Restat., sec. 843 (1939); VI-A Amer.L.Prop. 160 (1954); 5 Powell on Real Prop. 372 (1968).) This rule was reaffirmed in California in *Hudson v. West*, 47 Cal.(2d) 823, 306 P.(2d) 809 (1957), but without reference to the Miller case. It is submitted that the court would have done well in Miller to admit frankly that it had upheld a transfer of riparian rights for exercise on non-riparian land. Another example of the recognition, at least by implication, in riparian doctrine states of the legality of non-riparian use of lake or stream water is afforded by holdings or intimations that a non-riparian using such water on non-riparian land has a right that such use shall not be negligently or unreasonably interfered with, even by a riparian owner. See com. b & illus. 2 to sec. 856 of the Torts Restat. (1939); *Kennebunk, Kennebunkport & Wells Water Dist. v. Main Turnpike Authority*, 147 Me. 149, 84 A.(2d) 433 (1951); Haber and Bergen, *Water Allocation in the Eastern U.S.*, (chap. by Fisher) 481 (1958).
- 696 - In regard to the existing uncertainty as to what the New York common law now is on these points see pp. 55-111, ante.
- 697 - These factors are listed at pp. 44-5, ante.
- 698 - Indeed, it has been asserted in substance that the privilege of use is the only part of the riparian interest which can be classed as property, and that the rules governing the determination of reasonableness are not. (*Water Resources & the Law* (chap. by Lauer) 208-211 (1958).) It would follow from this that a change in such rules would not be a taking of property, and so could more easily be held constitutional than the abolition of the riparian privilege of use. Consequently, Lauer arrives at the conclusion that "any state might determine that within the riparian doctrine the single standard of reasonableness would apply in regard to all uses of water, thereby abolishing the rules that certain uses are per se unreasonable." This statement seems to lend support to the view taken herein that the provisions of the Harmful Use Bill under consideration would be upheld as constitutional. It should be borne in mind that the same conclusion could be reached even in jurisdictions which would realistically recognize a change in the rules as to the determination of reasonableness as a pro tanto taking of property, if they also would take the position adhered to in some states that property can be constitutionally taken without compensation by a valid exercise of the police power. (See p. 44, ante.)

- 699 - That legislation requiring an administrative agency to take the public interest into account when passing on applications for water use permits constitutes a valid exercise of the police power see Hutchins & Steele, Basic Water Rights Doctrines, 22 Law & Contemp. Probs. 276, 292 (1957). It would seem to follow that a statute requiring the courts to reckon with the public interest when passing upon the reasonableness of an alteration in or an activity in connection with a body of water would also be a valid police power measure. See also Trelease, Government Ownership & Trusteeship of Water, 45 Cal.L.R. 638,644 (1957).
- 700 - As recognizing the public interest in the achievement of such an adjustment, see Dunham, A Legal & Economic Basis for City Planning, 58 Col.L.R. 650, 666-7 (1958); Sax, Takings & the Police Power, 74 Yale L.J. 36,67 (1964); Rideout v. Knox, 148 Mass. 368, 373-4; 19 N.E. 390, 2 LRA 81 (1889); Camfield v. U.S., 167 U.S. 518, 523-4; 17 S.Ct. 866, 42 L.Ed. 261 (1896); Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 343, 349-50; 87 N.E. 504, 23 LNS 436 (1909); and Peo. v. N.Y. Carbonic Acid Gas Co., 196 N.Y. 421,435, 90 N.E. 441 (1909); Nelson v. DeLong, 213 Minn. 425, 7 N.W.(2d) 342,8 (1942).
- 701 - Dunham, A Legal & Economic Basis for City Planning, 58 Col.L.R. 650, 663-9 (1958); Sax, Takings & the Police Power 74 Yale L.J. 36,67 (1964); Trelease, Policies for Water, 5 Nat. Res. J. 1, 35 (1965).
- 702 - This analogy has often been suggested. See, for example, Beuscher, Appropriation Water Law Elements in Riparian Doctrine States, 10 Buf. L.R. 448, 458 (1961) where the analogy between zoning ordinances and adjustment of water rights among private riparian owners is suggested, and where it is said: "After all, zoning ordinances frequently take privileges of use from one group of landowners and give them to others." See also California-Oregon Power Co. v. Beaver Portland Cement Co., 77 F. (2d) 555, 567 (1934); affd. on other grounds, 295 U.S. 142, 55 S.Ct. 725, 95 L.Ed. 1356 (1935); O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549, 596, 604 (1962) and Iowa Natural Resources Council v. Van Zee, 158 N.W. (2d) 111, 8 (Ia. Sup.Ct., 1968).
- 703 - The fact that zoning ordinances normally decrease landowners' privileges of use while increasing their rights that their neighbors shall not make certain uses of their land, whereas the provisions of the Harmful Use Bill under consideration would increase riparian privileges of use while decreasing riparian rights that substantially harmful uses should not be made, would not appear to be a distinction of sufficient significance to destroy the analogy.
- 704 - Although complaints about zoning laws are increasing in frequency and force (Bartke and Gage, Mobile Homes: Zoning & Taxation, 55 Corn.L.R. 491 (1970)), such complaints have arisen because of dissatisfaction with the kind of zoning legislation which has for so long been prevalent (see, for example, Ahrens, Planned Unit Development, 35 Mo.L.R. 27 (1970)) rather than because of the belief that zoning ordinances disappoint to too great an extent the reasonable expectations of landowners as to what uses they make of their land. Because of the wide public acceptance

of zoning legislation as a means of equitably adjusting the interests of neighboring landowners as among themselves (*Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37,43; 258 N.Y.S. 229 (1932); Waite, *Governmental Power & Private Property*, 16 Cath. Un. of Amer. L.R. 283, 6, n.6 (1967)), and because the analogy between regulation of land use and regulation of water use is clear, it could well be argued that the enforcement of the provisions of the Harmful Use Bill under consideration should not and would not be held unconstitutional on the ground that it would too drastically disappoint the reasonable expectations of the riparian owners.

- 705 - 1 Rathkopf, *The Law of Zoning & Planning* (3d ed.) 6-6 (1966); *Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E. (2d) 517 (1954); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 6; 15 N.E. (2d) 587, 117 ALR 1110 (1938); *Johnson v. Apton*, 18 N.Y. (2d) 668, 273 N.Y.S. (2d) 417, 219 N.E. (2d) 868 (1966); *Stevens v. Town of Huntington*, 20 N.Y. (2d) 352, 229 N.E. (2d) 591, 283 N.Y.S. (2d) 16 (1967); *Schwartz v. Lee*, 22 N.Y. (2d) 742, 292 N.Y.S. (2d) 123 (1968).
- 706 - 6 Powell on Real Prop. 100 (1965); *Fulling v. Palumbo*, 21 N.Y. (2d) 30, 286 N.Y.S. (2d) 249, 251 (1967).
- 707 - See Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Fisher) 448, 474 (1958); O'Connell, *Iowa's New Water Statute*, 47 Ia. L.R. 549, 583, 615, 634 (1962); Kates, *Georgia Water Law*, 67-8 (1969); concurring opinion of Stewart, J. in *Hughes v. State of Washington*, 389 U.S. 290,5; 88 S.Ct. 438, 19 L.Ed. (2d) 530 (1967) & pp. 165-6, post.
- 708 - VI-A Amer.L.Prop. 169-70 (1954); Powell on Real Prop., sec. 715 (1968); Sax, *Water Law Planning & Policy*, 202 (1968); Hutchins & Steele, *Basic Water Rights Doctrines*, 22 Law & Contemp. Probs., 276, 284 (1957); *Water Resources & the Law* (chap. by Lauer) 197,8 (1958); O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549, 624,5 (1962); 5 *Water for Peace* (chap. by Ellis) 649,50 (1967); Plager & Maloney, *Regulation of Consumptive Use of Water in the Eastern U.S.*, 43 Ind.L.J. 383,4 (1968); Malakoff, *Erosion of a Water Right*, 5 Cal.West.L.R. 44,64 (1968); *Pratt v. Lamson*, 84 Mass. 275 (1861); *Bliss v. Kennedy*, 43 Ill. 67 (1867); *Warren v. Westbrook Mfg. Co.*, 88 Me. 58, 66; 33 A. 665 (1895); *Dyer v. Cranston Print Works*, 22 R.I. 506, 48 A. 791 (1901); *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713 (1903); *Prather v. Hoberg*, 24 Cal. (2d) 549, 150 P. (2d) 405 (1944).
- 709 - See pp. 59 & 64, ante.
- 710 - Orenschall & Imhoff, *Water Law's Double Environment*, 5 Land & Water L.R. 259, 288 (1970).
- 711 - "All in all, a change in the Iowa law (assuming it is a change) allowing one riparian to injure another substantially by his reasonable use would probably not be such a drastic, unforeseeable development in riparian law as to be beyond the bounds of the police power."--O'Connell

Iowa's New Water Statute, 47 Ia.L.R. 549,624 (1962). And at p. 625 Prof. O'Connell adds that an Iowa statute allowing apportionment would scarcely be so drastic and unforeseeable change in riparian law as to be beyond such bounds. The arguments herein advanced in support of the constitutionality of the Harmful Use Bill are characterized as cogent in Kates, Georgia Water Law, 70-1 (1969). Sec. 4 of art. 14 recently added to the N.Y. Const. and partially quoted in fn. 711a, post, would seem to strengthen the position of a litigant who, if the Harmful Use Bill were enacted, might have occasion to contend that it constituted a valid exercise of the police power and did not violate the due process clause of the N.Y. Const.

712 - See pp. 215 & 217, post.

713 - See p. 44, ante.

714 - See pp. 44-5, ante.

715 - That under the riparian doctrine riparian privileges are not lost by non-use, see the authorities, including New York cases, cited in fn. 64a, ante.

716 - That the riparian doctrine includes the variability principle, see the authorities including a New York case, cited in fn. 64b, ante.

717 - As indicative of the tendency of the more recent discussion of the police power to stress the importance of the extent to which a statute would disappoint the reasonable expectations of property owners, when passing on its validity as a police power measure, see Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Fisher) 448 (1958); O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549,583 (1962); Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S., 43 Ind. L.J. 383,6 (1968); and Hughes v. State of Wash., 389 U.S. 290, 296-7; 88 S.Ct. 438, 19 L.Ed. (2d) 530 (1967). That water law should be consistent with "an ethical commitment to the concept of fairplay" see Carver, A Federal Policy for Development of Western Water, 14 Rocky Mt. Min. Law Inst. 473,4 (1968); and this would seem to involve consideration for the reasonable expectations of the buyers of riparian land.

718 - See pp. 217-8, post.

719 - 6 Powell on Real Prop. 138-9 (1965); Mixon, Zoning for Diversity, 62 N.W. Un.L.R. 314,348 (1967); Comment: Zoning, Aesthetics & the First Amendment, 64 Col.L.R. 81,3,5 (1964); 38 N.Y.Un.L.R. 1002 (1963); 49 Corn.L.Q. 304,6 (1964); 79 Harv.L.R. 1320 (1966); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 986,8 L.Ed. (2d) 130 (1962); Fulling v. Palumbo, 21 N.Y. (2d) 30, 286 N.Y.S. (2d) 249 (1967).

720 - Peo. v. Miller, 304 N.Y. 105, 106 N.E. (2d) 34, 176 N.Y.S. (2d) 616 (1952); Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E. (2d) 327 (1955) and Matter of Harbison v. City of Buffalo, 4 N.Y. (2d) 553, 152 N.E. (2d) 42, 176 N.Y.S. (2d) 598 (1958).

- 721 - See p. 12, ante.
- 722 - The constitutional problem here considered is analogous to the one which might arise if L were to seek retroactive enforcement of sec. 15-0701 of the New York Environmental Conservation Law in which the Harmless Use Bill was embodied, and which problem was discussed at pp. 50-3, ante.
- 723 - For these reasons, see pp. 50-4, ante. The one of such reasons which is inapplicable to the problem under consideration here is the reason based on the scarcity of N.Y. judicial holdings as to the ability of a harmless alteration to initiate a prescriptive privilege.
- 724 - Because of the importance of the public policy in favor of ultimately legalizing long continued courses of conduct, even though wrongful, after the parties wronged have failed to protect their rights by prosecuting the actions available to them. (See p. 52, ante.)
- 725 - That a party lacks standing to challenge the constitutionality of a statute unless its enforcement would be harmful to him, see *In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 140 N.W. (2d) 626, 633 (1966).
- 726 - See authorities cited in fn. 645, ante.
- 727 - 73 F. (2d) 255 (1934); *affmd.*, 295 U.S. 142, 55 Sup.Ct. 725, 95 L.Ed. 1356 (1935).
- 728 - For the facts and holding in this case, see fn. 209, ante.
- 729 - 73 F. (2d), 555, 562, 568, 569 (1934).
- 730 - This distinction constitutes an important basis of the zoning law rule protecting preexisting nonconforming uses, 2 Rathkopf, *The Law of Zoning & Planning* (3d ed.) 58-1 (1960); 2 Yokley, *Zoning Law & Practice* (3d ed.) 218 (1965); *Matter of Crossroads Recreation, Inc. v. Broz*, 4 N.Y. (2d) 39, 42; 149 N.E. (2d) 65, 172 N.Y.S. (2d) 129 (1958); *Town of Greenburgh v. Bobandal Realities, Inc.*, 10 N.Y. (2d) 414, 421; 179 N.E. (2d) 702, 223 N.Y.S. (2d) 857 (1961; 44 Corn.L.Q. 450, 3 (1959)).
- 731 - 295 U.S. 142, 165; 55 S.Ct. 725, 95 L.Ed. 1356 (1935).
- 732 - For such assertions see *Water Resources & the Law* (chap. by King) 297 (1958); O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549, 599 (1962).
- 733 - For such a suggestion see *Water Allocation in the Eastern U.S.* (chap. by Fisher) 471 (1958).
- 734 - See, for example, Trelease, *Coordination of Riparian & Appropriative Rights*, 33 Tex.L.R. 24, 64 (1954); Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Fisher) 448-9 (1958); *Water Resources & the Law* (chap. by King) 298-301 (1958); O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549, 599-601 (1962).

- 735 - 167 Kan. 546, 207 P.(2d) 440 (1949).
- 736 - Kan.Stat.Ann., sec. 82a-702.
- 737 - id., sec. 82a-701(d).
- 738 - id., sec. 82a-703.
- 739 - id., sec. 82a-703.
- 740 - id., sec. 82a-705.
- 741 - id., sec. 82a-712.
- 742 - id., sec. 82a-716.
- 743 - id., sec. 82a-716 as it read at the time that Emery was decided. (See 207 P.(2d) 440,6 (1949).) In 1957 the sentence quoted was amended so as to read as follows: "Any person with a valid water right or permit to divert and use water may restrain or enjoin in any court of competent jurisdiction a subsequent diversion by a common-law claimant without vested rights without first condemning those common-law rights." For the definition of "water right" see sec. 82a-701(g), which defines it so as to include vested rights which are defined in sec. 82a-701(d).
- 744 - 167 Kan. 546,207 P.(2d) 440,3 (1949).
- 745 - If the downstream owners had been using the water prior to the enactment of the statute, they would have had, by virtue of the statute's express terms, vested rights in the water to the extent of that use, which rights would have been destructible only for nonuse. (Secs. 82a-701(d) & 82a-703.) It seems quite unlikely that the state engineer would have issued a permit without expressly making it subject to vested rights based on use made prior to the enactment of the statute, if the downstream owners in fact had such vested rights.
- 746 - 167 Kan. 546,207 P.(2d) 440,3 (1949).
- 747 - As the Harmful Use Bill codifies the riparian doctrine that priority in time shall not be decisive as between claimants in proposed sec. 429-m(1) (see p. 219,post.), it could have this effect.
- 748 - In regard to the existing uncertainty as to what the New York common law now is with respect to the legality of substantially harmful alterations see p. 55, ante.
- 749 - "Thus, while the Emery case seems to hold that riparian rights are not 'vested' to the full extent established by previous precedent and are subject to legislative modification, the modification actually effected here, insofar as it abrogated any rights, eliminated only the natural

flow right which as was said, some Kansas cases had already done. As to any other modifications, the statute...effected a change only in the available remedy - or, as the court put it, only in a mere matter of procedure, not of substance." - Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Fisher) 450 (1958). The fact that the revision of the Kansas statute in 1957, while adding a new section 82a-717a containing a provision that "...any common-law claimant with a vested right, or other person with a vested right, a prior appropriation right, or an earlier permit may divert water in accordance with any such right or permit although such diversion or use thereunder conflicts with the diversion, use, proposed diversion, or proposed use made or proposed by a common-law claimant who does not have a vested right...", left unchanged the provision in sec. 82a-716 for compensation to common law claimants injured by appropriators appears to indicate legislative satisfaction with the interpretation of the original statute in *Emery*, and to justify Fisher's conclusion as to the limited extent of the modification of common law riparian rights effected by the original statute. The construction put upon the Kansas statute in *Emery* was confirmed in *Williams v. City of Wichita*, 190 Kan. 317, 374 P.(2d) 578 (1962); app.dism. for want of substantial federal question, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed. (2d) 38 (1963).

- 750 - Nor would *Baeth v. Hoisveen*, 157 N.W.(2d) 728 (N.Dak.Sup.Ct., 1968), noted in 4 Land & Wat.L.R. 185 (1969), and the cases on which *Baeth* relied lend much support to the constitutionality of the provisions in the N.Y. Harmful Use Bill legalizing the infliction of substantial harm, when reasonable, on riparians who had begun their use of a lake or stream prior to the enactment of the bill; for these cases go no farther than to uphold the constitutionality of a statute impairing ground water privileges unexercised before the enactment of the statute. Moreover, it seems doubtful that the frequently cited case of *In re Hood River*, 114 Or. 112, 227 P. 1065 (1924) could be relied upon by defenders of the constitutionality of the proposed New York provisions. While the effect of *Hood* is to deny significant protection to used riparian rights unless their owner elects to convert them to appropriative rights (Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Fisher) 455 (1958)), this would seem to be a less serious impairment of such rights than would be legalized by the proposed New York legislation. Although both *Wasserburger v. Coffee*, 180 Nebraska 149, 141 N.W.(2d) 738 (1966) and *Joslin v. Marin Munic. Water Dist.*, 67 Cal.(2d) 132, 60 Cal.Rptr. 377, 429 P.(2d) 889 (1967), decided in states recognizing both appropriative and riparian rights, took the position in substance that a subsequent appropriator can lawfully inflict substantial uncompensated harm, if reasonable, on a riparian owner whose exercise of his riparian privilege antedated the appropriation, the citation of either as establishing the constitutionality of such a position would seem to be precluded by the fact that in neither case did the riparian owner contend that adherence to the view entertained by the court would involve a taking of his property in violation of the 14th amendment to the federal constitution.

- 751 - 174 U.S. 690, 702-3; 19 S.Ct. 770, 43 L.Ed. 1136 (1898).
- 752 - See, for example, *Water Resources & the Law* (chap. by King) 292 (1958); and O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549, 597-8 (1962).
- 753 - See p. 44, ante.
- 754 - See Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Fisher) 456 (1958). In *Trelease, Alaska's New Water Use Act*, 2 Land & Wat. L.R. 1, 32 (1967) it is said in substance that a state may exercise this power provided it recognizes existing rights.
- 755 - In *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.(2d) 549, 554 (1947) the court's declaration, supported by the citation of Rio Grande and other U.S. Supreme Court cases, that a state had power to change its water law, was also made in the course of a description of the division of the power over rivers between the federal government and the states.
- 756 - 174 U.S. 690, 703; 19 Sup.Ct. 770, 43 L.Ed. 1136 (1898).
- 757 - Consistent with this interpretation of Rio Grande is the comment on that case in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 159; 55 S.Ct. 725, 95 L.Ed. 1356 (1934).
- 758 - 206 U.S. 46, 94; 46 S.Ct. 118, 51 L.Ed. 956 (1907).
- 759 - 206 U.S. 49, 95-6 S.Ct. 118, 51 L.Ed. 956 (1907).
- 760 - 206 U.S. 46, 117-8; 46 S.Ct. 118, 51 L.Ed. 956 (1907).
- 761 - Although the question as to whether Kansas riparians could recover damages from Colorado for the harm caused them by the diversion was not squarely passed upon, the inference that the court would answer that question in the negative can reasonably be drawn. See fn. 17, ante.
- 762 - 282 U.S. 660, 670; 51 S.Ct. 286, 75 L.Ed. 602 (1931).
- 763 - It is interesting to note in passing that in *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E. (2d) 549 (1947) a Massachusetts riparian owner harmed by the diversion involved in *Conn. v. Mass.* recovered damages therefore from Massachusetts. The statute which authorized the diversion (Acts & Resolves of Mass., 1927, chap. 321) provided for such compensation in its 4th section. Although the court did not designate this provision as the basis for the plaintiff's recovery, its existence precludes the citation of the case as authority for the proposition that a state is obligated at common law to give compensation for harm caused to its riparian owners by a change in its water law. Whether the Massachusetts legislature included the provision because it doubted that declarations of the sort under consideration were meant to exempt the state from liability for such harm, or because it thought it unjust or contrary to the public interest to exercise a power which it had is a speculative matter.

- 764 - 295 U.S. 142, 163-4; 55 S.Ct. 725, 95 L.Ed. 1356 (1934).
- 765 - See p. 155, ante.
- 766 - 220 U.S. 61, 31 St.Ct. 337, 55 L.Ed. 369 (1911).
- 767 - For analogical support the court relied heavily upon *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729 (1900) which upheld the constitutionality of a state statute regulating the extraction and disposition of oil and gas.
- 768 - The court below (170 F. 1023 (1909)) had upheld the statute, apparently on the ground that it codified for mineral waters, or was at least consistent with the New York rule forbidding harmful withdrawal of percolating water for a use not connected with the overlying land (*Forbell v. City of N.Y.*, 164 N.Y. 522, 58 N.E. 644, 51 LRA 695 (1900); *Hathorn v. Natural Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504, 23 LNS 436 (1909); *Peo. v. N.Y. Carbonic Acid Gas Co.*, 196 N.Y. 421, 90 N.E. 441 (1909)). The Supreme Court, however, without explaining why, failed to avail itself of this apparently valid approach.
- 769 - *Hathorn v. Natural Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504, 23 LNS 436 (1909). In this case the court almost but does not quite declare that the statute codified the *Forbell* rule insofar as it was applicable to mineral waters.
- 770 - "A state is also free to change from one system to another subject to limits imposed by the due process clause of the Fourteenth Amendment..." *Larson, Development of Water Rights*, 38 N.Dak.L.R. 243, 254 (1962).
- 771 - 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.(2d) 530 (1967).
- 772 - 26 Wash. (2d) 635, 175 P.(2d) 955 (1946).
- 773 - 67 Wash. (2d) 799, 410 P.(2d) 20 (1966).
- 774 - 389 U.S. 290, 3, 88 S.Ct. 438, 19 L.Ed. (2d) 530 (1967).
- 775 - 389 U.S. 290, 5, 88 S.Ct. 438, 19 L.Ed. (2d) 530 (1967).
- 776 - Justice Stewart's emphasis on the unforeseeability of the change should meet with the approval of the writer who said: "Change must not be so drastic that, in the light of past decisions and changing circumstances, it could not reasonably have been expected to occur in the course of the gradual development of the law." - *Haber & Bergen, Water Allocation in the Eastern U.S.* (chap. by Fisher) 448 (1958). See also *O'Connell, Iowa's New Water Statute*, 47 Ia.L.R. 549 (1962) in which it is said at p. 615: "The system may change; as long as the change is rationally designed in the public interest and not (so) startling or inequitable as to disturb the reasonable expectations of those with the right to make use of water, the change is probably not an invasion of whatever property rights exist." See also *Kates, Georgia Water Law* 67-8 (1969).

- 777 - Although it has been said that there is no property interest in the rules prevailing at any particular time as to the distribution of water (O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549, 614 (1962)), and although it has been held that a person does not have a vested interest in the decision of any court and that a change of decision does not deprive a person of property without due process of law (Baumann v. Smrha, 145 F. Supp. 617,625; affd.w.o., 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed.(2d) 73 (1956)), there are cases recognizing an exception to this doctrine and supporting the view that changes in law effected by the judicial decisions of state courts can under certain circumstances constitute violations of the contract clause (Art. I, sec. 10) or of the due process clause (14th Amend., sec. 1) of the federal constitution. See, for example, Muhlker v. N.Y. & Harlem Rr. Co., 197 U.S. 544, 25 S.Ct. 522, 49 L.Ed. 872 (1904) and Harris v. Brooks, 225 Ark. 426, 283 S.W.(2d) 129,134; 54 ALR (2d) 1440 (1955). See also O'Neil v. Northern Colo. Irrig. Co., 242 U.S. 20, 37 S.Ct. 7,61 L.Ed. 123 (1916) in which the existence of the exception was recognized, although it was held that the case before the court did not fall within it. And in Baumann also the court showed awareness of the exception by saying at 624: "The power of a state either to modify or reject the doctrine of riparian rights... has long been settled by the adjudicated cases. Of course, such a modification in the law of the state must recognize valid existing vested rights..." It would also seem proper to hold that circumstances justifying the application of the exception exist when it appears that retroactive enforcement of the new judicial rule would disappoint well grounded and reasonable expectations of a property owner. (See the authorities cited in fns. 717 & 776, ante.) The existence of this exception is not always mentioned by writers relying on the doctrine of Baumann. See, for example, J.D. Ellis, Modification of the Riparian Theory and Due Process in Missouri, 34 Mo.L.R. 562,9 (1969). For general discussion see Hirshman, Limitation of Retroactivity of Judicial Decision, 24 Corn.L.Q. 611 (1939) & Hale, The Supreme Court and the Contract Clause, 57 Harv.L.R. 512,855-8 (1944).
- 778 - 389 U.S. 290,7-8; 88 S.Ct. 438, 19 L.Ed.(2d) 530 (1967). This language did not, however prevent a holding in Bach v. Sarich, 74 Wash. (2d) 575, 445 P.(2d) 648,653-4 (1968) that a decision that a federal patentee of land underlying a lake could not fill it in and erect an apartment house upon it, because such an act would not constitute a riparian use, was permissible under Justice Stewart's opinion. The Washington court drew a distinction between complete destruction of a title to riparian land and restrictive delineation of the riparian privileges appurtenant thereto. The distinction is, of course, a nice one, since the land title protected in Hughes was one created by the enforcement of a riparian right.

The decision in St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U.S. 358, 18 S.Ct. 157,42 L.Ed. 497 (1897) that the state of Minnesota could, without violation of the 14th amendment,

authorize the diversion of water from the Mississippi River for municipal supply without compensation to a lower riparian owner whose water power was diminished by the diversion does not conflict with the position taken by Justice Stewart, because the St. Anthony decision was not based on Minnesota's power to change its water law, but on the finding that under Minnesota law riparian owners on navigable rivers had always held their rights subject to the state's power to divert the water for a public purpose without compensation to harmed riparians. See 168 U.S. at 371.

779 - See pp. 55-6, ante.

780 - In view of the cogent reasons for preferring the reasonable use version of the riparian doctrine over its natural flow version (4 Torts Restat., chap. 41 (1939); Trelease, Coordination of Riparian and Appropriative Rights, 33 Tex.L.R. 24,36 (1954); Cribbet, Illinois Water Rights Law 4,50 (1958); 5 Powell on Real Prop. 366 (1968)), and for following the reasonable use version rules that substantially harmful alterations can be lawful if reasonable and that the public interest is relevant to the reasonableness issue (see pp. 65-8,76-7,87-91,94-7 & 103-112, ante), the courts might well elect to avoid the constitutional question and smooth the path for the provisions under consideration by holding that they were codifications of the common law.

781 - See pp. 146-9, ante.

782 - See pp. 152-3, ante.

783 - 194 N.Y. 326, 87 N.E. 504, 23 LNS 436 (1909).

784 - 194 N.Y. 326, 342; 87 N.E. 504, 23 LNS 436 (1909).

785 - Forbell v. City of N.Y., 164 N.Y. 522, 58 N.E. 644, 51 LRA 695 (1900); Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 341; 87 N.E. 504, 23 LNS 436 (1909).

786 - The fact that a statute is designed to adjust the privileges and rights of adjoining owners as among themselves counts in its favor when the courts are deciding whether or not it constitutes a valid exercise of the police power. See p. 45, ante; the authorities cited in fns. 217 and 218a, ante, and the quotations from N.Y. Court of Appeals opinions set forth at pp. 167-8, post.

787 - The waste referred to at p. 349 of the official report of the Hathorn case was that which would be caused by the violation of another part of the legislation; a part which was held to be valid as a police power measure. See the next paragraph of the text.

788 - The legislation referred to at this point is that which was unsuccessfully attacked in the federal courts on constitutional grounds in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337,55 L.Ed. 369 (1911). The statement of its purport in the text is based on the summary of its terms appearing at p. 73 of the official report of the Lindsley case and was previously referred to herein at p. 163, ante.

789 - 194 N.Y. 326, 343; 87 N.E. 504, 23 LNS 436 (1909).

790 - The context indicates that "they" refers to the people.

791 - This assertion in *Hathorn* of a public interest in the preservation of natural resources was contradicted in *Peo. v. N.Y. Carbonic Acid Gas Co.*, 196 N.Y. 421, 90 N.E. 441 (1909) in the following language at pp. 435 & 440 of the official report: "It is for the interest of the state that no one should use his own property improperly; but the state could not, under the plea of protecting its natural resources, arbitrarily, arrest the work of the defendants and deprive them of the right to prosecute a lawful business, whatever its effect upon the subterranean waters and gases...It does not appear that the state has any property in mineral springs to protect." "It is urged that the public have such an interest in the mineral waters of Saratoga, because of their great curative and health giving properties, that the legislature may interpose for their protection under the right of the state in the exercise of its police power 'to protect and develop its natural resources', even though the waters themselves are the property of private persons. I deny that the police power vests in the legislature any such right." It should be noted, however, that at p. 441 Chief Judge Cullen, in his concurring opinion, intimates that the public might have an interest in the preservation of lakes and streams, if not in the conservation of percolating water. He said: "That the right to appropriate springs and subterranean waters is an incident of the ownership of the land is settled...That doctrine has been limited by the case of *Forbell v. City of New York*...The modification, however, is only this: that the absolute right of appropriation as against other landowners who may be injured thereby extends only to a reasonable use of the water. The reasonableness of the use, however, is a question between the several landowners, not between the landowner and the public unless an actual stream or watercourse is affected." It should be noted, moreover, that it was declared in *Matter of City of Syracuse v. Gibbs*, 283 N.Y. 275, 283; 28 N.E.(2d) 835 (1940) that the state has the duty to control and conserve its natural resources; and that the New York legislature in 1968 and 1969 gave its approval to what is now sec. 4 of art. 14 of the N.Y. Const. and which provides that "The policy of the state shall be to conserve and protect its natural resources...The legislature, in implementing this policy, shall include adequate provision for...the development and regulation of water resources." Also pertinent in this connection is sec. 10 of the Environmental Conservation Law (L. 1970, chap. 140) which declares that it is "the policy of the State of New York to conserve, improve and protect its natural resources." It would seem to follow that the New York Court of Appeals and the New York legislature share the belief that the state has the power to do so. It would also seem that a reasonable explanation of the existence of the duty and power to protect the natural resources of the state would be the existence in the public of an interest in their preservation. While this assumption is supported by the following statement of Justice Holmes in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355; 28 S.Ct. 529, 52

L.Ed. 828 (1908): "...the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.", *City of Altus v. Carr*, 255 F.Supp. 828; *affd.w.o.*, 285 U.S. 35, 87 S.Ct. 240, 17 L.Ed. (2d) 34 (1966) has raised doubts as to the extent to which *McCarter* remains authoritative. See 2 *Waters & Water Rights* (chap. by Corker) 319,321 (R.E. Clark ed., 1967); *Beuscher*, *Water Rights* 433, 444 (1967); *Sax*, *Water Law, Planning & Policy* 90 (1968); *Weatherford*, *Legal Aspects of Interregional Water Diversion*, 15 U.C.L.A.L.R. 1299, 1323 (1968); *White*, *Reasonable State Regulation of the Interstate Transfer of Percolating Water*, 2 *Natural Resources Lawyer* 383,9 (1969); 9 *Ariz. L.R.* 334,338 (1967); & 47 *Ore.L.R.* 228 (1968). But even if the authority of *McCarter* turns out to have been completely destroyed, the validity of the Harmful Use Bill provisions under consideration could properly be founded on their furtherance of the well recognized public interest in the equitable adjustment of the privileges and rights of adjoining landowners, as indicated by the New York Court of Appeals in the *Carbonic Gas* cases. See also authorities cited in fn. 786, ante.

792 - 194 N.Y. 326,349-350; 87 N.E. 504, 23 LNS 436 (1909).

793 - 196 N.Y. 421,435; 90 N.E. 441 (1909).

794 - For the text of par. (g) see p. 219, post.

795 - See pp. 112-122, ante.

796 - As to these three views, see p. 130, ante.

797 - The constitutionality of retroactive enforcement of par. g is discussed at pp. 174-6, post.

798 - These criteria are listed at p. 44, ante.

799 - Statements indicating that the courts have thought that it would be undesirable to prohibit the erection of substantial and expensive structures with malicious intent, and thus to make the legality of the use of land dependent on a finding as to the motive of the landowner appear in *Rideout v. Knox*, 148 Mass. 368,372; 19 N.E. 390, 2 LRA 81 (1889) and *Beardsley v. Kilmer*, 236 N.Y. 80,90; 140 N.E. 203, 27 ALR 1141 (1923). It should be borne in mind, however, as already pointed out (see p. 130, ante), that in the states which have made motive relevant in certain situations there appears to be no agitation for the abandonment of this position.

800 - See, for example, *Flaherty v. Moran*, 81 Mich. 52,45 N.W. 381, 8 LRA 183 (1980); and *Erickson v. Hudson*, 70 Wyo. 317, 249 P. (2d) 523 (1952).

- 801 - See, for example, *Gallagher v. Dodge*, 48 Conn. 387, 40 Am.Rep. 382 (1880); and *Saperstein v. Berman*, 219 A.D. 747, 220 N.Y.S. 163 (1927).
- 802 - 107 Minn. 145, 119 N.W. 946, 22 LNS 599 (1909).
- 803 - Among other cases which could not be so cited because they too go no farther than to hold that a complaint based on malicious motivation can state a cause of action is *Stevens v. Kelley*, 78 Me. 445, 6 A. 868 (1886).
- 804 - See *Chatfield v. Wilson*, 31 Vt. 358,363 (1858); *Weare v. Chase*, 93 Me 264,44 A. 900 (1899); & *Stillwater Water Co. v. Farmer*, 89 Minn. 58,93 N.W. 907, 60 LRA 875 (1903).
- 805 - 148 Mass. 368,372; 19 N.E. 390, 2 LRA 81 (1889).
- 806 - *Wheatley v. Baugh*, 25 Pa. 528,533 (1855); *Stevens v. Kelley*, 78 Me. 445, 6 A. 868, 870 (1886).
- 807 - *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 130 N.E. 48, 13 ALR 928 (1921). For quotations from the opinion in this case pertinent to the point under consideration, see p. 126, ante.
- 808 - See the authorities cited in fns. 217, 218a & 700, ante, and *Saperstein v. Berman*, 119 Misc. 205, 195 N.Y.S. 1 (Sup.Ct., 1922).
- 809 - See the authorities cited in fn. 217, ante.
- 810 - See p. 148, ante.
- 811 - See pp. 170-1, ante.
- 812 - See pp. 171-3, ante.
- 813 - See p. 173, ante.
- 814 - See p. 151, ante and cases cited in fn. 720, ante.
- 815 - 148 Mass. 368, 19 N.E. 390, 2 LRA 81 (1889).
- 816 - 167 U.S. 518,523-4; 17 S.Ct. 866, 42 L.Ed. 261 (1896).
- 817 - 148 Mass. 368,374; 19 N.E. 390, 2 LRA 81 (1889).
- 818 - See p. 173, ante.
- 819 - 148 Mass. 368, 372; 19 N.E. 390,2 LRA 81 (1889). But that this statement might not be held applicable in the field of riparian rights see p. 173, ante.

- 820 - As tending toward a negative conclusion see Cribbet, Illinois Water Rights Law, 28-9 (1958); Sax, Water Law, Planning & Policy 210-211 (1968); and *Munninghoff v. Wisconsin Conservation Comn.*, 255 Wis. 252, 9; 38 N.W. (2d) 712 (1945) - dictum. For arguments in support of the affirmative position see Haber & Bergen, Water Allocation in the Eastern U.S. (chap. by Fisher) 480-3 (1958); Water Resources & the Law (chap. by Lauer) 211-2 (1958); O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549,626-632 (1962). As to the legality against citizens of state A of non-riparian use by state B under the doctrine of equitable apportionment between states, and as to the legality of a non-riparian use against the citizens of state B made under an authorization by that state, see pp. 161-2 & fn. 763, ante.
- 821 - For the full text of sec. 429-1 (ell) see pp. 216-7, post.
- 822 - That a riparian owner has this right at common law in New York and in a plurality of the states see p. 140, ante.
- 823 - As to these considerations, see pp. 43-54, ante.
- 824 - As to these considerations, see pp. 146-214, ante.
- 825 - See pp. 147 & 177, ante.
- 826 - As to the validity of these provisions as police power measures see pp. 146-177, ante.
- 827 - 2 N.Y. (2d) 330,141 N.E. (2d) 429,160 N.Y.S. (2d) 859 (1953).
- 828 - 189 Misc. (2d) 2991, 1003 et seq.; 76 N.Y.S.(2d) 758 (Sup.Ct., 1947).
- 829 - 281 A.D. 433,440-1,455; 120 N.Y.S.(2d) 269 (1953).
- 830 - Successors to the interest of System Properties.
- 831 - 2 N.Y.(2d) 330,5,9; 141 N.E.(2d) 429,160 N.Y.S.(2d) 859 (1953).
- 832 - 2 N.Y.(2d) 330,343; 141 N.E.(2d) 429, 160 N.Y.S.(2d) 859 (1953).
- 833 - 281 A.D. 433,440; 120 N.Y.S.(2d) 269 (1953).
- 834 - 185 Misc. 696,702-6; 57 N.Y.S.(2d) 777 (Sup.Ct., 1945).
- 835 - 281 A.D. 433,445; 120 N.Y.S.(2d) 269 (1953).
- 836 - As the court cited *Granger* in which it was held that the state owned the bed of Canandaigua Lake, its statement that the title to Lake George is in the state should probably be taken as a declaration that title to its bed is in the state; particularly in view of the New York authority to the effect that neither sovereign nor subject can own the mass of flowing water in a lake and its outlet. See cases cited in fn. 854, post.

- 837 - 2 N.Y.(2d) 330,344-5; 141 N.E.(2d) 429,160 N.Y.S.(2d) 859 (1953).
- 838 - Does the continued adherence of the Water Resources Commission to its position that water can lawfully be withdrawn for agricultural and industrial purposes without a commission permit and without payment of a rental to the state, even from lakes and streams the beds of which are state-owned (see fn. 538, ante), despite the decisions in *Duryea and System*, cast doubt on the interpretation put upon those cases in the text? Granted that if the state possessed such powers, they would enable it to require permits and to charge rentals (Schwartz, *Water Rights Under the Federal Power Act*, 102 Un. of Pa. L.R. 31,50 (1953)), it is submitted that this question can be answered in the negative. First, because the commission's policy of not requiring permits and not charging rentals for such uses is probably based primarily on its doubt that the legislature intended that the commission should require permits and exact rentals from agricultural and industrial water users rather than on the commission's doubt as to whether *Duryea and System* had held that the legislature had the power to direct it to do so - though such a doubt may have provided a secondary basis for the commission's policy. Second, because the commission is probably reluctant, unless expressly directed by the legislature, to change a long-standing policy on which numerous agricultural and industrial users of the water of lakes and streams with state-owned beds have relied when investing in irrigation equipment and in industrial plants. (See fn. 538, ante.)
- 839 - In *Squaw Island Freight Terminal Co., Inc. v. City of Buffalo*, 273 N.Y. 119, 127-8; 7 N.E.(2d) 10 (1937) the court said: "As to tidal waters the rule is that riparian owners are not entitled to have such waters free from pollution...The underlying basis for this exception as to tidal waters is that the State is the absolute owner of the bed of the stream and may grant rights therein of benefit to the public, subject only to the right of the public to use the waters for purposes of navigation."
- 840 - See fn. 836, ante.
- 841 - See, for example, sec. 15-1705 & 15-1745 of the N.Y. Environmental Conservation Law, quoted in fn. 538, ante.
- 842 - The requirements of navigability and state ownership of the bed are apparently viewed as fulfilled even when the stream or lake is not navigable at the point of private use and even when the bed at such point is privately owned, since the entire area of a lake or the entire course of a river need not be navigable for the lake or stream to be classified as navigable (*Niagara Falls Power Co. v. Water Power & Control Commission*, 267 N.Y. 265,270; 196 N.E. 51 (1935)), and since state grants of parts of the underwater land owned by it are subordinate to the trust for the benefit of the public subject to which the state originally held the title (*Peo. v. N.Y. & Staten Island Ferry Co.*, 68 N.Y. 71, 76-9 (1877); *Peo. v. N.Y. and Ontario Power Co.*, 219 A.D. 114, 116-7; 219 N.Y.S. 497 (1927); *Matter of City of Syracuse v. Gibbs*, 283 N.Y. 275,283; 28 N.E.(2d) 835 (1940).)

- 843 - Andrews, New York and Its Waters, 16 Corn.L.Q. 1,6 (1930); Peo. v. N.Y. & Ontario Power Co., 219 A.D. 114,6; 219 N.Y.S. 497 (1927).
- 844 - 202 F. (2d) 190,199-200; affd. sub. nom. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239,74 S.Ct. 487,98 L.Ed. 666 (1954) without discussion of New York's paramount, superior or sovereign power.
- 845 - Andrews, New York and Its Waters, 16 Corn.L.Q. 1,6 (1930); Peo. v. N.Y. & Ontario Power Co., 219 A.D. 114,6; 219 N.Y.S. 497 (1927).
- 846 - Emphasis added.
- 847 - 19 Misc. (2d) 217,221; 188 N.Y.S.(2d) 854 (Ct. of Cl., 1959); affd. in memo. opinions making no reference to the state's powers - 11 A.D.(2d) 599, 220 N.Y.S.(2d) 451 (1960); 9 N.Y.(2d) 606, 176 N.E.(2d) 42, 217 N.Y.S.(2d) 9 (1961).
- 848 - Lee, Acquisition of Riparian Rights in New York, 1964 Proceedings, Amer. Bar Assn., Section of Mineral and Natural Resources Law, 19.
- 849 - 168 U.S. 349,358,371; 18 S.Ct. 157,42 L.Ed. 497 (1897). This case was cited in Hughes v. State of Wash., 389 U.S. 290,4; 88 S.Ct. 438, 19 L.Ed.(2d) 530 (1967) as holding that "a State may, without paying compensation, deprive a riparian owner of his common-law right to utilize the flowing water" without referring to the fact that the court concluded in St. Anthony that private riparian interests in Minnesota were subject to that hazard from the beginning of the state's existence.
- 850 - As to the limitation on the power of a state court to effect a change in state law by its decisions, see p. 166 & fn. 777, ante.
- 851 - 6 N.Y. 522 (1852).
- 852 - 4 Wend. 9,21 (N.Y. Ct. of Err., 1829).
- 853 - 6 N.Y. 522, 544 (1852).
- 854 - While in the earlier New York cases the courts not infrequently asserted the state's ownership of the waters as well as of the beds of certain lakes and streams, the later New York judicial opinions have taken a different position. Thus in Smith v. City of Rochester, 92 N.Y. 463,44 Am.Rep. 393 (1883) the court, speaking of running water, said at p. 480: "Neither sovereign nor subject can have any greater than a usufructuary right therein..." This statement was repeated in Sweet v. City of Syracuse, 129 N.Y. 316,355; 27 N.E. 1081 (1891) and amplified as follows: "and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use. These propositions have been often stated by jurists and in judicial decisions in different forms, but it is believed that they all concur in the same general result." See also in substantial accord Waterford Elec. Light, Heat & Power Co. v. State of N.Y., 208 A.D. 273,283; 203 N.Y.S. 858 (1924); affd. w.o., 239 N.Y. 629, 147 N.E. 225 (1925); and

Niagara Mohawk Power Co. v. Federal Power Commission, 202 F.(2d) 190,8 (1952); affd. sub nom. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239,74 S.Ct. 487,98 L.Ed. 666 (1954). The Supreme Court opinion included at p. 247 of the official report the quotation from Sweet set forth above. The view expressed in the later New York cases finds impressive support in Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 Harv.L.R. 195,234 (1914) where it is said: "recently a strong tendency has arisen to regard running water and wild game as *res publicae*; to hold that they are owned by the state, or better, that they are assets of society which are not capable of private appropriation or ownership except under regulations that protect the general social interest." (emphasis added); and in Pound, *Introduction to the Philosophy of Law*, 111 (rev.ed., 1953) where the following statement appears: "...in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house." See also in substantial accord O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549,595 (1952); Goldberg, *Interposition - Wild West Water Style*, 17 Stan. L.R. 1,22,25 (1964). While the earlier practice of asserting state ownership of various waters has not been entirely discontinued (see, for example, N.Y. Environmental Conservation law secs. 15-1701 & 15-1705, quoted in fn. 538, ante), it is worthy of note that the governor of New York, in his memorandum in regard to L. 1943, c. 46 which included sec. 15-1701 elected to refer to the state's "power and control" over water rather than to its ownership of water. That even the water of a lake which, for lack of an outlet, has no current should be held incapable of absolute ownership, because such water is "continually shifting and evaporating" see Comment: 37 N.Y.Un.L.R. 1377,9 (1960).

Doubt has been expressed as to whether a state actually increases its powers of control over the waters within its borders by asserting ownership thereof. (*Water Resources & the Law* (chap by Lauer), 233 (1958).) See also Trelease, *Government Ownership & Trusteeship of Water*, 45 Cal. L.R. 638,644 (1957) and Goldberg, *supra*, this footnote. In the states recognizing the prior appropriation doctrine constitutional or statutory declarations of the public ownership of waters are nevertheless quite common. See Hutchins, *Selected Problems in the Law of Water Rights in the West* 78-80 (1942). In *Proctor v. Sims*, 134 Wash. 606, 236 P. 114 (1925), decided in a dual system state the constitution of which contained an express declaration that all waters within the state belong to the public, it was held that plaintiff, a private owner of all the land surrounding a non-navigable lake without an outlet and situated in an arid part of the state did not own the water in the lake and could not recover from the defendant the value of the water abstracted by him for irrigation even though he committed a trespass in order to effect his withdrawals. The doctrine of *Proctor* has, however, been limited by subsequent cases, see *Botton v. State*, 69 Wn.(2d) 751, 420 P.(2d) 352 (1966) in which it was pointed out that it was not shown in *Proctor*

that defendant's withdrawals had permanently lowered the level of the lake or damaged plaintiff's land; in which a distinction was drawn between arid and non-arid parts of the state, and in which one of the judges stated in substance that it was wise to retreat somewhat from the concept of public ownership of the waters in the state. In the east public ownership of the water as well as of the beds of ponds and lakes covering more than ten acres is established in those of the New England states which adhere to the so-called great ponds doctrine. See *Dolbeer v. Suncook Waterworks Co.*, 72 N.H. 562, 58 A. 504 (1904) & *Sacco v. Dept. of Public Works*, 352 Mass. 670, 227 N.E.(2d) 478 (1967). But, since it has been said that the state's ownership of a great pond is in trust for the people (*In re Opinion of the Justices*, 118 Me. 503, 106 A. 865 (1919)), it is not clear that even great pond doctrine states have dominium of rather than imperium over the water of great ponds.

Although, as pointed out above, the New York courts now tend to favor the position that water in a natural lake or stream cannot be owned either by the state or by a private person, it seems likely that if the New York courts were called upon to decide whether the water of a lake or pond which apparently could not under New York law be classified as navigable because its lack of an outlet and its dimensions prevented its use for commerce or travel (see fn. 862, post) were owned by the person or governmental entity having title to all the land surrounding it, they would answer the question in the affirmative. (See *Loch Sheldrake Associates, Inc. v. Evans*, 306 N.Y. 297, 118 N.E.(2d) 444 (1954).) It seems probable, moreover, that this result would be arrived at in any other eastern state which recognizes only riparian rights, and which is not prevented from reaching such a conclusion by adherence to the great ponds doctrine (see *Dolbeer*, supra), or by a constitutional or statutory declaration of state ownership of water (see *Proctor*, supra). As tending to support this conclusion see 3 *Tiffany on Real Prop.* (3d ed.) 154 (1939); 56 *Amer. Juris.* 535 (1947); Bennett, *Concurrent Legal Interests in Water Supplies*, 22 *Sou. Cal. L.R.* 349 (1949); 2 *Nichols on Eminent Domain* (rev. 3d ed.) 219 (1964); *Hardin v. Jordan*, 140 U.S. 371, 390; 11 S.Ct. 808, 35 L.Ed. 428 (1890); *Albright v. Sussex County Lake & Park Comn.*, 71 N.J.L. 303, 57 A. 398 (Err. & App., 1904); *Osceola County v. Triple Development Co.*, 90 So. (2d) 600 (Fla. Sup.Ct., 1956); *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.(2d) 689, 693 (1960). And it was said in *U.S. v. Chandler-Dunbar Co.*, 229 U.S. 53, 69; 33 Sup.Ct. 667, 57 L.Ed. 1063 (1913) that "Ownership of a private stream wholly upon the lands of an individual is conceivable;..." But if the body of water entirely surrounded by the land of one owner is a navigable lake a decision that the owner of the surrounding land also had title to the water could hardly be expected, particularly if the title to the bed of the lake is in the state in trust for the public. (See *Branch v. Oconto County*, 13 Wis.(2d) 595, 109 N.W.(2d) 105 (1961).) In view of the probability referred to above that under the New York law a lake can qualify as navigable only if its dimensions permit its use for commerce or travel, and of the further probability that no New York lake fulfilling this requirement is entirely surrounded by land owned by one person, it is quite unlikely that the New York courts will ever be confronted with the question as to whether the owner of all the land surrounding such a lake is the owner of the water of the lake as well.

- 855 - 19 N.Y. 523,527-8 (1859).
- 856 - 33 N.Y. 461,7 (1865).
- 857 - 26 Wend. 404 (Ct. of Err., 1841).
- 858 - 33 N.Y. 461,485,500 (1865). But the grant to a private riparian of a part of the bed does not always result in the loss by the state of its sovereign or reserve power derived from its ownership of the bed prior to the grant. See fn. 842, ante.
- 859 - 70 A.D. 543,6; 75 N.Y.S. 100 (1902); affd. w.o., 175 N.Y. 469, 67 N.E. 1088 (1903).
- 860 - 257 N.Y. 126, 177 N.E. 394 (1931).
- 861 - As to the terms of the grant from New York to Massachusetts under the Treaty of Hartford see *Smith v. City of Rochester* 92 N.Y. 463,476; 44 Am. Rep. 393 (1883).
- 862 - If, as seems likely, the customary riparian privileges to which the court referred were the boating and other recreational activities in which the riparian owners had been accustomed to engage over the entire area of the lake, the court had good ground for stating that if the lake bed were held to be privately owned, the riparian owners would be deprived of their customary privileges. There are New York cases supporting the view that if a lake bed is in private ownership, no riparian owner has the privilege of passing over the part of the lake bed owned by another. (See the authorities cited in the last paragraph of this note) And this would seem to be true, even if the body of water is navigable, unless the navigation easement is broad enough to include recreational boating. Consistent with the view that it is not is the following definition of navigable water in *Fairchild v. Kraemer*, 11 A.D.(2d) 232,204 N.Y.S.(2d) 823 (1960): "...a waterway is navigable in fact only when it is used, or susceptible of being used, in its natural and ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water..." It is true that the court added that "the fact that a stream has been used for pleasure boating may be considered on the subject of the stream's capacity and the use of which it is susceptible", but this statement does not clearly affirm either that a body of water is navigable if capable of use for recreational boating (a proposition with which *Mix v. Tice*, 164 Misc. 261,6; 298 N.Y.S. 441 (Sup.Ct., 1937) is inconsistent), or that if a body of water is navigable because capable of use for commercial traffic, the navigation easement can lawfully be exercised for recreational boating. Nor does *St. Lawrence Shores, Inc. v. State*, 60 Misc. 2d 74, 302 N.Y.S.(2d) 606 (Ct. of Cl., 1969) necessarily establish either of these propositions; for it goes no farther than to hold that a creek is navigable which is usable for travel in small boats. Such

travel may, of course, be recreational, but it is doubtful that all recreational boating should be held to constitute travel within the meaning of that word as used in the law of navigability. As far as the author is aware, no New York court had made either of these affirmations prior to Granger. Moreover, it could be argued that neither affirmation would be permissible in New York under Navigation Law, sec. 2, pars. 4, 5 & 6 of which read as follows: "4. 'Navigable water of the state' shall mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated...5. 'Navigable in fact' shall mean navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation. 6. 'Vessel' shall mean any floating craft and all vessels shall belong to one of the following classes: (a) 'Public vessel' shall mean and include every vessel which is propelled in whole or in part by mechanical power and is used or operated for commercial purposes on the navigable waters of the state; that is either carrying passengers, carrying freight, towing, or for any other use; for which a compensation is received. (b) 'Pleasure vessel' shall mean and include every vessel not within the classification of public vessel. However, the provisions of this chapter shall not apply to row-boats and canoes except as otherwise expressly provided." In accord with the foregoing is the following statement from *Brant Lake Shores, Inc. v. Barton*, 61 Misc. 2d 902, 7, 307 N.Y.S. (2d) 1005 (Sup.Ct., 1970): "Nor does the fact that Chapter 445 of the Laws of 1899, declaring Spuyten Devil Creek, Brant Lake and Brant Lake Creek, tributaries of Schroon River, to be public highways for the purpose of floating logs, timber and lumber down those streams give anyone a greater right to the use of the waters of Brant Lake than one had prior to such declaration. As a public highway anyone could use it for generally accepted highway purposes over water, such as floating logs and timber, but this does not include the right to boat, bathe and swim." In holding a lake to be non-navigable in *Proctor v. Sim*, 134 Wash. 606, 236 P. 114, 6 (1925) the court said: "A lake which is chiefly valuable for fishing or for pleasure boats of small size is ordinarily not navigable." (For comment on *Proctor* see R.W. Johnson, *Riparian & Public Rights to Lakes & Streams*, 35 Wash. L.R. 580, 597-8 & 601 (1960).) In some states, however, the courts have made one of the affirmations above referred to. See *Muench v. Public Service Comn.*, 261 Wis. 492, 53 N.W.(2d) 514, 9 (1952) taking the position that a stream is navigable if it is capable of floating any boat, skiff or canoe used for recreational purposes; and *Gaudet, Water Recreation - Public Use of "Private" Waters*, 52 Cal.L.R. 171, 9 (1964) citing cases from several jurisdictions as supporting the proposition that the public has a right of recreation incident to the public easement of navigation for commerce. Although *Gaudet* includes *Fairchild* in this group, for the reasons given above it is doubtful that he was justified in doing so. See also *Beck, Governmental Refilling of Lakes*, 46 Tex.L.R. 180, 202 (1967). Under

dicta in several New York cases, including Commonwealth Water Co. v. Brunner, 175 A.D. 153,162; 161 N.Y.S. 794 (1916) and other cases listed in 35 N.Y. Un.L.R. 1377, 1380, fn. 18 (1960), if the bed of the body of water with respect to which privileges of boating, fishing and swimming are claimed is privately owned, such privileges would be exercisable by a riparian claiming them only on or in such part of the body of water as lay over bed which he owned, even if the water is navigable, unless the exercise of recreational privileges is included in the navigation easement. Among the many collections of authorities in accord with and contra to these New York dicta are those found in 9 Un. of Kan.L.R. 91 (1960); 14 Rutgers L.R. 837 (1960); Reis, Policy & Planning for Recreational Use of Inland Waters, 40 Temp. L.Q. 155, 173-180 (1967).

- 863 - 257 N.Y. 126,131; 177 N.E. 394 (1931).
- 864 - 267 N.Y. 265,196 N.E. 51 (1935).
- 866 - Peo. ex rel. Niagara Falls Hydraulic & Mfg. Co. v. Smith, 70 A.D. 543,6; 75 N.Y.S. 100 (1902); affd. w.o., 175 N.Y. 469,67 N.E. 1088 (1903); Niagara Mohawk Power Corp. v. Federal Power Commission, 202 F.(2d) 190,199; affd. sub nom. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S.Ct. 487,98 L.Ed. 666 (1954).
- 867 - 267 N.Y. 265,276-7; 196 N.E. 51 (1935).
- 868 - 267 N.Y. 265,7; 196 N.E. 51 (1935).
- 869 - 283 N.Y. 275, 28 N.E.(2d) 835 (1940).
- 870 - 283 N.Y. 275, 281; 28 N.E.(2d) 835 (1940).
- 871 - 129 N.Y. 316,328; 27 N.E. 1081 (1891).
- 872 - 283 N.Y. 275,283; 28 N.E.(2d) 835 (1940).
- 873 - 283 N.Y. 275,283; 28 N.E.(2d) 835 (1940).
- 873a - 283 N.Y. 275,287-8; 28 N.E.(2d) 835 (1940).
- 874 - 283 N.Y. 275, 283; 28 N.E.(2d) 835 (1940).
- 875 - Then sec. 523 of the Conservation Law: now sec. 15-1503 of the Environmental Conservation Law.
- 876 - It may also be worthy of note that the decision in Gibbs might conceivably have been predicated on the doctrine that governmental entities created by the state, such as municipalities and state agencies, to which the state has granted powers, cannot successfully maintain the position that legislation modifying or revoking those powers is unconstitutional. (Black River Regulating Dist. v. Adirondack League Club, 307 N.Y. 475,487; 121 N.E.(2d) 428 (1954); app.dism., 351 U.S. 922,76 S.Ct.

780, 100 L.Ed. 1453 (1956).) In other words it is suggested that the commission's decision that the Village of Jordan could use a certain amount of the water of Skaneateles Lake for municipal supply could have been sustained without reference to any state sovereign or reserve power over the waters of the lake, even if the pre-1931 legislation had actually given Syracuse complete control over the lake. That the doctrine of Black River does not, however, prevent the members of a state agency from seeking a determination of the constitutionality of a statute when, because they believe it to be unconstitutional, they are faced with the alternative of violating their oaths to uphold the constitution by complying with it, or running the risk of expulsion from office for refusal to comply, see *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.(2d) 1060,4 (1968).

876a - Gould, Tibbetts, Loomis, Niagara Falls Electric, Granger, Niagara Falls Power and Syracuse discussed at pp. 188-196, ante.

877 - 92 N.Y. 463,44 Am.Rep. 393 (1883).

878 - 92 N.Y. 463,6; 44 Am.Rep. 393 (1883).

879 - 92 N.Y. 463,474; 44 Am.Rep. 393 (1883).

880 - 92 N.Y. 463,476; 44 Am.Rep. 393 (1883).

881 - 92 N.Y. 463,486; 44 Am.Rep. 393 (1883).

882 - 92 N.Y. 463,476; 44 Am.Rep. 393 (1883).

883 - Examination of the authorities cited by the court in support of its statement that the state's sovereign power includes the right to resume ownership and possession of such property as may be required or rendered necessary for public purposes (*Varick v. Smith*, 5 Paige's Ch. 143, 159 (1835); *Matter of Albany St.*, 11 Wend. 149 (Sup.Ct., 1834); *Morgan v. King*, 35 N.Y. 454 (1866)) warrants the inference that the court was at this point referring once again to the state's power of eminent domain.

884 - 92 N.Y. 463,477; 44 Am.Rep. 393 (1883).

885 - 92 N.Y. 463,483-4; 44 Am.Rep. 393 (1883).

886 - 129 N.Y. 316,27 N.E. 1081 (1891).

887 - 129 N.Y. 316,327-9 & 332; 27 N.E. 1081 (1891).

888 - 129 N.Y. 316,334; 27 N.E. 1081 (1891).

889 - 129 N.Y. 316,335-6; 27 N.E. 1081 (1891).

890 - Discussed at pp. 194-6, ante.

- 891 - This decision appears to have been a wise one in the light of holdings by the courts arrived at both prior and subsequent to it that the state cannot exercise its navigation power without making compensation "for a public work not within, but wholly outside, the channel of the river", even though the public work is a canal. See *Waller v. State of N.Y.*, 144 N.Y. 579, 39 N.E. 680 (1895); *Fulton Light, Heat & Power Co. v. State of N.Y.*, 200 N.Y. 400, 418-420; 94 N.E. 199 (1911) and cases cited therein; and *Waterford Elec. Light, Heat & Power Co. v. State of N.Y.*, 208 A.D. 273, 288; 203 N.Y.S. 858 (1924); *affd. w.o.*, 239 N.Y. 629, 147 N.E. 225 (1925).
- 892 - It must be conceded, however, that the Fulton rule stated in fn. 891 was cited in *Duryea* (196 Misc. 696, 703; 57 N.Y.S.(2d) 777) without apparent recognition of any inconsistency between it and the result which the court had arrived at; perhaps because Fulton could easily enough be distinguished from the case before the court in *Duryea* on the ground that the bed of the river involved in Fulton was privately owned whereas the bed of the river involved in *Duryea* was owned by the state. Nevertheless, it seems possible to argue that a court which construes the state's navigation power so narrowly as to require the state to pay for the harm caused by its withdrawal of water for canal purposes, might well hesitate to hold, even as to water over a state owned bed, that the state possessed a sovereign power enabling it to take the water without compensation for any purpose, provided only that it was public.
- 893 - 168 N.Y. 134, 61 N.E. 158, 56 LRA 500 (1901).
- 894 - 168 N.Y. 134, 8; 61 N.E. 158, 56 LRA 500 (1901).
- 895 - 154 N.Y. 61, 47 N.E. 1096, 38 LRA 606 (1897).
- 896 - 168 N.Y. 134, 139-145; 61 N.E. 158, 56 LRA 500 (1901).
- 897 - 144 N.Y. 75, 38 N.E. 992, 26 LRA 378 (1894).
- 898 - 133 N.Y. 79, 30 N.E. 654, 15 LRA 618 (1892).
- 899 - In *Rumsey* it was pointed out at p. 87 of the official report that *Gould v. Hudson River Rr. Co.*, 6 N.Y. 522 (1852), which held to the contrary, had previously been "virtually" overruled. For discussion of *Gould* see p. 188, ante.
- 900 - *Danes v. State of N.Y.*, 219 N.Y. 67, 113 N.E. 786 (1916) might also be added to this group.
- 901 - For discussion of these cases, see pp. 196-203, ante.
- 902 - For discussion of these cases, see pp. 188-196, ante.
- 903 - See pp. 187-8, ante. The courts which decided *Duryea* and *System* did not discuss the question as to their power to change the law, probably because they were proceeding on the assumption that they were applying existing law.

904 - See pp. 165-6 and fns. 776 & 777, ante.

905 - "To the extent that they (water rights) are uncertain, logically a reasonable change under the police power alters expectations less and arguably thereby does not deprive a riparian of property without due process of law." - O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549, 595 (1962). See also the same author at p. 634 of the same article. What he says as to the validity of changes in law effected by an exercise of a legislature's police power would seem to be applicable by analogy to changes effected by the courts through the exercise of their broad power to improve the common law by making alterations in it. But while such considerations might justify morally as well as legally the enforcement of the state's sovereign power to the prejudice of a riparian owner who, when he bought his riparian land, was aware of the state of the New York authorities as to the existence and extent of such power, it could well be argued that because most of the riparian owners who bought riparian land in New York prior to Duryea and System would in fact have been totally unacquainted with the New York cases, the New York Legislature should not be too ready to exercise the state's sovereign power in ways harmful to riparian owners.

906 - See pp. 146-177, ante.

907 - See p. 50 & fn. 218a, ante.

908 - See pp. 180-4, ante.

909 - See pp. 44-5, ante.

910 - See p. 70 and authorities cited in fn. 316, ante.

911 - T. R. Lee, Counsel in Charge of the Water Supply Section of the Condemnation Division of the Law Department of New York City, when considering the possibility of obtaining additional water supplies for New York City more economically than in the past, seems to assume that if the extent of the city's obligation to compensate riparian owners harmed by withdrawals for municipal supply is to be reduced, that reduction will have to be accomplished by the exercise of the state's sovereign power rather than by resort to its police power. See Lee, Acquisition of Riparian Rights in New York, 1964 Proceedings, Amer. Bar Assn., Section of Mineral & Natural Resources Law.

912 - See, for example, Minneapolis Mill Co. v. Brd. of Water Comrs. of City of St. Paul, 56 Minn. 485, 58 N.W. 33 (1894), affd. sub nom. St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U.S. 349, 18 S.Ct. 157, 42 L.Ed. 497 (1897) in which the phraseology employed was "public right" rather than "sovereign power". See also Rundle v. Delaware & Raritan Canal Co., 55 U.S. 80, 14 L.Ed. 335 (1852) in which the court in upholding an uncompensated diversion, pursuant to legislative authority, of water from the Delaware River for canal purposes, which might not have been permissible under the navigation power (see authorities

cited in fn. 891, ante), said at pp. 93-4 of the official report: "The case before us requires us only to decide, that by the laws of Pennsylvania, the River Delaware is a public, navigable river, held by its joint sovereigns, in trust, for the public; that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the State. That such license is revocable, and in subjection to the superior right of the State, to divert the water for public improvements." See also as to the Pennsylvania law *Fulmer v. Williams*, 122 Pa. 191, 15 A. 726, 1 LRA 603 (1888). Some basis for the view that the State of Iowa possesses a similar sovereign power over lakes and streams the beds of which are publicly owned is afforded by *Board of Park Comrs. v. Diamond Ice Co.*, 130 Ia. 603, 105 N.W. 203 (1905) and *Higgins v. Board of Supervisors*, 188 Ia. 448, 176 N.W. 268 (1920); but as it seems possible to interpret these cases as standing for the proposition that there are no riparian rights in navigable bodies of water the beds of which are in public ownership, the Iowa law is unclear as to whether the state controls such waters because of its complete ownership of them or because of a sovereign power which enables it to override in the public interest such private rights as exist in them. For comment on these cases and on this question see Davis, *Water Rights in Iowa*, 41 Ia.L.R. 216, 235 (1956) and O'Connell, *Iowa's New Water Statute*, 47 Ia.L.R. 549, 584-7 (1962). If a qualified version of the no-riparian-rights-in-navigable-waters interpretation were put on these cases: viz., if they were interpreted as indicating that owners of land bordering on such waters have no riparian rights as against the state, leaving them with riparian rights as among themselves, it could be argued that although the Iowa courts in their opinions in these cases made no express reference to a sovereign power in the state, they had impliedly recognized its existence not only by their holdings but by their reference to the legislative duty to enact such laws as to such waters as would best preserve their use for all persons. See the *Diamond* case, 105 N.W. at 205. The foregoing comment (on the Iowa situation) would appear to have a bearing on the possible existence of a sovereign power in the State of Washington over navigable waters of which it owns the bed. See R.W. Johnson, *Riparian & Public Rights to Lakes & Streams*, 35 Wash.L.R. 580, 595, 601-5 (1960) denying the accuracy of the often made statement that Washington recognizes no riparian rights in such waters; and asserting that although there are none as against the state, they exist as between private individuals. As the acts of the State of Washington affecting such waters which its courts have upheld against attack on constitutional grounds have at times been so harmful to the private owners of land bordering on such waters that it would have been difficult to sustain them as within the state's police power (see pp. 44-5, ante.), and so remotely connected with navigation that it would have been inappropriate to uphold them as an exercise of the state's navigation power (see *State ex rel. Ham v. Superior Court of Grant County*, 70 Wash. 442, 126 P. 945 (1912) & *Port of Seattle v. Oreg. & Wash. R.R. Co.*, 255 U.S. 56, 63-4; 41 S.Ct. 237, 65 L.Ed. 500 (1920)), it could be argued that the Washington courts probably justified such acts, impliedly though not expressly, as done by virtue of the state's sovereign or substantially similar power.

- 913 - Hackensack Water Co. v. Village of Nyack, 289 F.Supp. 671 (U.S. Dist. Ct., S.D.N.Y., 1968). In this case the court said at p. 683: "It is not at all clear that, if the Water Resources Commission purported to grant to the Village of Nyack the right to divert 3 MGD without making compensation therefore to the lower riparian owner (assuming that such diversion if done by a private person would be wrongful), such a grant would constitute an unconstitutional taking of the plaintiff's property without compensation." Duryea and System were among the cases cited by the court.
- 914 - Beck, Governmental Refilling of Lakes, 46 Tex.L.R. 180,212 (1967).
- 915 - Sperry Rand Corp. v. Water Resources Comn., 30 A.D. (2d) 276,291 N.Y.S.(2d) 716 (1968) lv. to app.den., 24 N.Y.(2d) 737 (1969).
- 916 - See authorities cited in fn. 177, ante.
- 917 - Matter of City of N.Y. (Speedway), 168 N.Y. 135,141-5; 61 N.E. 158,56 LRA 500 (1901); Fulton Light, Heat & Power Co. v. State of N.Y., 200 N.Y. 400,418; 94 N.E. 199 (1911).
- 918 - In Harnsberger, Eminent Domain & Water Law, 48 Neb.L.R. 325,446 (1969) it is pointed out that title insurance policies generally include a provision exempting the insurance company from liability for loss resulting from the exercise of the federal navigation power. If it is customary to include similar provisions with respect to state powers it is conceivable that many prospective purchasers of riparian land have received some warning of the hazards created by the existence of New York State's sovereign power over waters as well as by the existence of its navigation power; at least if the land is located in areas in which most prospective buyers of land procure title insurance. It should be borne in mind, however, that in several parts of the state in which lakes and streams suitable for recreational use are situated, prospective buyers of land have usually relied on an attorney's search of the title and have not obtained title insurance.
- 919 - That the New York legislature decided almost 30 years ago that the doctrine that every man is presumed to know the law often leads to injustice and should not, therefore, always be adhered to is shown by the enactment in 1942 of sec. 3005 of the Civil Practice Law & Rules which provides that "When relief against a mistake is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact." For comment on this statute see the recommendation and study of the New York Law Revision Commission in Leg.Doc. (1942) No. 65(B).
- 919a - Colberg, Inc. v. State, 67 Cal.(2d) 408, 62 Cal.Rptr. 401, 432 P. (2d) 3 (1967: cert.den., 390 U.S. 949, 88 S.Ct. 1037, 19 L.Ed.(2d) 1139 (1968)); a decision criticized in Harnsberger, Eminent Domain & Water Law, 48 Neb. L.R. 325,442-5 (1969) and characterized as "monstrous" in Staebuck, Condemnations of Riparian Rights, 30 La.L.R. 394,435 (1970).

- 920 - Morgan & Lewis, *The State Navigation Servitude*, 4 Land & Water L.R. 521,537 (1969). The unfairness to the riparian owner is caused by the uncompensated substantial impairment or even destruction of his riparian rights in order to serve a public purpose the cost of accomplishing which could be spread over and collected from its numerous beneficiaries by taxation or service charges without undue hardship to them. See authorities cited in fns. 375,491, & 529, ante.
- 921 - See p. 206, ante.
- 922 - 83 N.Y. 178,185; 38 Am.Rep. 407 (1880).
- 923 - 200 N.Y. 400,420; 94 N.E. 199 (1911).
- 924 - See p. 181, ante.
- 925 - 185 Misc. 696,703-4; 57 N.Y.S.(2d) 777 (Sup.Ct., 1945). Probably supporting but certainly consistent with the position taken in *Chenango, Fulton and Duryea* are the statements in *Matter of Van Etten v. City of N.Y.*, 226 N.Y. 483,6; 124 N.E. 201 (1919) in regard to *Esopus Creek*, the bed of which was probably privately owned since the creek was not navigable; the statements in *Niagara Falls Power Co. v. Water Power & Control Commission*, 267 N.Y. 265,277; 196 N.E. 51 (1935); and the statement in *Rose v. State of New York*, 24 N.Y.(2d) 81,298 N.Y.S. (2d) 969,973-4 (1969), a case involving the *Chenango*, a navigable river with a privately owned bed. Conflicting inferences can be drawn from the cases cited in *Hackensack Water Co. v. Village of Nyack*, 289 F. Supp. 671,683-4 (U.S.Dist.Ct., S.D.N.Y., 1968) and from the tenor of the court's comments on them as to whether the court believed that the state's sovereign or reserve power was restricted to bodies of water the beds of which are owned by the state.
- 926 - 2 N.Y.(2d) 330,343; 141 N.E. (2d) 429, 160 N.Y.S.(2d) 859 (1953).
- 927 - "...most states do own at least some of the beds within their boundaries. Usually they own the beds underlying navigable bodies of water, but not those underlying nonnavigable bodies of water." - Beck, *Governmental Refilling of Lakes*, 46 Tex. L.R. 180, 206 (1967). As shown by *Chenango* and *Fulton*, however, there are in New York many bodies of navigable water, the beds of which are privately owned. Again, in a few jurisdictions the state owns the beds of lakes whether navigable or not (1 Powell on Real Prop. 650 (1969)); but this is not true in New York. (Colson, *Title to Beds of Lakes in New York*, 9 CornL.Q. 159,307 & 317 (1924).) The State of New York may, of course, acquire ownership of the bed of a non-navigable lake or stream by adverse possession, eminent domain or negotiated purchase, or it may have retained it by express exception from the original patent; but it seems probable that the amount of land underlying non-navigable water which it has acquired or retained by such methods constitutes only a small fraction of the total.

- 928 - See p. 185, ante.
- 929 - 20 Misc. (2d) 369,372; 195 N.Y.S.(2d) 214 (1959).
- 930 - 20 Misc.(2d) 369,373-4; 195 N.Y.S.(2d) 214 (1959).
- 931 - See pp. 180-4, ante.
- 932 - See p. 140, ante.
- 933 - See p. 142, ante.
- 934 - For the text of sec. 429-1(ell) see pp. 215-6, ante. Sec. 15-0701 goes no farther with the relaxation of restrictions on non-riparian uses than to legalize those which are harmless. See pp. 23-6, ante.
- 935 - As to these considerations, see pp. 140-5, ante.
- 936 - Although a statute creating the privilege of harmful non-riparian use, subject to certain conditions, could readily be interpreted as creating by implication an ancillary right in the holder of such a privilege that his exercise of it should not be unreasonably interfered with, there is enough authority at common law denying redress to persons whose non-riparian use of lake or stream water has been interfered with by another (see *Elgin Hydraulic Co. v. City of Elgin*, 194 Ill. 476,62 N.E. 929 (1902); *Doremus v. Mayor, etc. of City of Paterson*, 65 N.U. Eq. 711,55 A. 304 (Err. & App., 1903); *Egyptian Lacquer Mfg. Co. v. Chemical Co. of America*, 93 N.J.L. 305, 108 A. 249 (Sup.Ct., 1919), affd. on opin. below, 94 N.J.L. 557, 111 A. 926 (Err. & App., 1920); *Magnolia Petroelum Co. v. Dodd*, 125 Tex. 125,81 S.W.(2d) 653,5 (1925); *Masonite Corp. v. Burnham*, 164 Miss. 840,146 So. 292,6 (1933); *Kennebunk etc. Water Dist. v. Maine Turnpike Authority*, 145 Me. 35,71 A.(2d) 520 (1950); *Harrell v. City of Conway*, 224 Ark. 100,271 S.W. (2d) 924 (1954); *Young v. City of Asheville*, 241 N. Car. 618,86 S.E.(2d) 408 (1955)) to make it advisable to include in the recommended statute an express provision for the protection of such privileges of harmful non-riparian use as the statute creates in order to prevent a court from holding to the privilege and for its protection, the cases cited bar recognition of such a right. Legislation authorizing harmful non-riparian use under certain conditions and containing provision for the recognition of a protective right ancillary to the privilege of use could find support in *Torts Restatement*, sec. 856 (1939) which declares in substance that a non-riparian use is protectible if the party making it has acquired such a privilege of use by grant. The recommended legislation, however, by indicating how such a privilege may be created and how its extent may be determined, would go farther than the *Torts Restatement*, which takes the position that the rules governing the creation of such a privilege are beyond its scope. It would seem, moreover, that sec. 429-1(ell) should be amended by the addition of a similar provision. For discussion of the common law obstacles which make the recommended legislation advisable, see 3 *Tiffany on Real Prop.* (3d ed.), sec. 736 (1939).

- 937 - For authorities supporting the proposition that riparian land ordinarily loses its status as such when deprived of contact with the water by conveyance see the authorities cited in fn. 957, post.
- 938 - It is recommended hereinafter that the legislation proposed at this point be complemented by a statute expressly empowering a riparian owner, subject to the conditions above stated, to reserve to himself his riparian privileges and rights when conveying his riparian land; to transfer them to another person although retaining his riparian land; and to transfer them to another person along with a part of his riparian tract which will be made non-riparian by the conveyance because it is so located that it will have no contact with the water after the conveyance. See sec. 3 of chap. 8, post.
- 939 - 1 Amer.L.Prop. 145 (1952); 5 Powell on Real Prop. 392 (1971); Fuller v. Arms, 45 Vt. 400, 7 (1873); Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 6, 89 P. 338 (1907) & Taylor v. Armiger Body Shop, 40 Del. Ch. 22, 172 A.2d 572, 3 (1961).
- 940 - 6 Powell on Real Prop. 224 (1973); Honaker v. Hutchinson, 305 Ky. 790, 205 S.W. 2d 683 (1947); Bass v. Harper, 437 S.W.2d 648 (Tex. Civ.App., 1968) & Sun Oil Co. v. Emery, 183 Neb. 793, 164 N.W. 2d 644 (1969).
- 941 - As to this doctrine see p. 16, & the authorities cited in fn. 64b, ante.
- 942 - See, for example, Lawrie v. Silsby, 82 Vt. 505, 74 A. 94, 6 (1909); United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N.Y. 38, 49, 123 N.E. 200 (1919) & Smith v. Stanolind Oil & Gas Co., 179 Okla. 499, 172 P.2d 1002, 1005-6 (1946). Davis, Australian & American Water Allocation Systems Compared, 9 Bost.Coll.Indust. & Com'l L.R. 647, 682 (1968) appears to concur in this interpretation of Lawrie. The subjection of the transferee of a severed riparian interest to the doctrine of reasonableness is suggested in Plager & Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S., 43 Ind.L.J. 383, 396 (1968). Torts Restat. 2d, Tent.Dr. 17, sec. 857(2) declares: "A non-riparian who holds a grant from a riparian proprietor of the grantor's right to the water of a watercourse or lake is subject to liability to a riparian proprietor only for an unreasonable use of the water that causes harm to the riparian proprietor's reasonable use of water or to his land."; and com. b reads as follows: "Harm caused by grantee of riparian right. The transfer of a riparian right to a non-riparian by grant...transfers to the non-riparian the rights of the riparian proprietor. That proprietor can make no unreasonable use that causes harm to a reasonable use of the water by or the land of a downstream riparian (sec. 850A) and the grantee's rights cannot rise above those of his grantor." But as the Torts Restat. 2d apparently has rejected the riparian doctrine of variability (see com. 1(ell) to sec. 850B & note at p. 147), the Torts Restat. could be cited as contra to the view expressed herein that a transferee of a riparian interest might under certain circumstances have greater and/or more numerous privileges and rights than his transferor.

- 943 - See pp. 141-2 & 215-6, ante.
- 944 - Another justification for the failure of the recommendations made in this chap. 8 in regard to the relaxation of New York restrictions on non-riparian use to parallel more closely the provisions of sec. 429-1(e11) of the Harmful Use Bill can be found in the expectation that that bill will be enacted, if ever, several years before the proposals in chap. 8 are presented to the legislature. In such event it would have an opportunity to evaluate the effect of the cautious partial step toward the abolition of restrictions on non-riparian use embodied in sec. 429-1(e11), and might be prepared to look with more favor than it otherwise would on the enactment of the broader and more complete relaxation of the restrictions recommended in chap. 8.
- 945 - As to the reasons for relaxing riparian doctrine restrictions on the use of lake and stream water on non-riparian land see pp. 141-3, ante.
- 946 - See the statutes listed in 5 Water for Peace (chap. by Ellis) 656-7 (1967); nor does the suggestion made in Guerard, The Riparian Rights Doctrine in South Carolina, 21 S.Car.L.R. 757,769 (1969) go as far as does sec. 429-1(e11).
- 947 - See the authorities cited in fns. 717,776 & 777, ante.
- 948 - See the authorities cited in fn. 820, ante.
- 949 - Indeed it appears to be well settled that an owner of riparian land can when conveying it prevent his grantee from receiving riparian privileges and rights by excepting or reserving them. (5 Powell on Real Prop. 394 (1968); Davis, Australian & American Water Allocation Systems Compared, 9 Bost.Coll.Ind. & Com'l.L.R. 647,682-3 (1968); Hatch v. Dwight, 17 Mass. 289,299 (1821); Rood v. Johnson, 26 Vt. 64, 71 (1853); Forest Lakes Mutual Water Co. v. Santa Cruz Land Title Co., 98 Cal.App. 489, 277 P. 172,5 (1929); Thurston v. City of Portsmouth, 205 Va. 909,140 S.E.(2d) 678 (1965); City of Miami v. Eastern Realty Co., 202 Sou.(2d) 760,770 (Fla. Ct. of App., 1967).) The rule supported by the authorities just cited is stated in Peo. ex rel. Burnham v. Jones, 112 N.Y. 597,606; 20 N.E. 577 (1889) and seems to have been taken for granted in Frontier Town Properties, Inc. v. State of N.Y., 58 Misc. (2d) 388,296 N.Y.S.(2d) 90,4 (Ct. of Cl., 1968), though it was not stated by the court. As to the validity against third parties of such a reservation, see fn. 988, post.
- 950 - In Locke v. Yorba Irrig. Co., 35 Cal. (2d) 205,217 P. (2d) 425 (1950) there was testimony that if the water rights had not been severed from the riparian land conveyed it would have been worth from \$150. to \$200. more per acre.
- 951 - See the discussion in Miller & Lux, Inc. v. J.G. James Co., 179 Cal. 689,178 P. 716 (1919) of the advantage which would accrue to the other riparian owners if the non-riparian use were held unlawful in a comparable situation.

- 952 - "Where there is competition for water, it is doubtful that there is a better way of determining the most productive use than through the willingness of a prospective user to pay as much for a water right as a current user considers he must receive to relinquish it." - Fox, *Water: Supply, Demand & the Law*, 32 Rocky Mt.L.R. 452,462 (1960). "Decisions as to the most productive or wisest use of property can be made by private persons ...The maximization principle is generally believed to be achieved, or approached by free men in a capitalistic society when they make decisions on where and how they will employ their labor and capital." - Trelease, *Policies for Water*, 5 Nat.Res.J. 1,6 (1965). "...those who can use the water more profitably will be willing to pay more for the water right." - Levi, *Highest & Best Use: An Economic Goal for Water Law*, 34 Mo. L.R. 165,174 (1969).
- 953 - If the instrument purporting to transfer the riparian owner's riparian privileges and rights to a non-riparian transferee without the land to which they were incident at the time of the transfer contained no covenants for title affirming that the transferor owned them and amounting to a promise to pay damages if there was a third person who could lawfully interfere with the transferee's enjoyment of them, and if the transfer was attempted in a state adhering to the plurality common law rule forbidding the harmful use of water for the benefit of non-riparian land (see p. 140, ante), the transferee's ability to recover what he had paid for the privileges and rights after discovering that although the transferor could not prevent him from exercising them in connection with non-riparian land (Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Arens 401 (1958); 1 Rogers & Nichols, *Water for California* 248 (1967); Yocco v. Conroy, 104 Cal. 468,471; 38 P. 107 (1894); Calif. Pastoral & Agric. Co., Ltd. v. Madera Canal & Irrig. Co., 167 Cal. 78,86; 138 P. 718 (1914)), the other riparian owners on the body of water involved would be able to do so because the attempted transfer was not good as against them (Note: 34 N.Car.L.R. 247,250 (1956); Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Arens) 401 (1958); Reis, *Connecticut Water Law*, 46-9 (1967); Hutchins, *Irrigation Water Rights in California* (Calif. Agricul. Exper. Station, Circular 452 Revised) 22 (1967); 5 Powell on Real Prop. 392-4 (1968)) would seem to depend on whether privileges and rights which were not good as against the other riparians were smaller than those he had bargained for, and on whether, if they were, the law will allow him to recover the price because paid under mistake.

If the transfer was preceded by a contract to transfer, it is conceivable that an answer to the question as to whether the transferee had bargained for no more than privileges and rights good only as against his transferor could be found in the terms of the contract. It seems unlikely, however, that this would be true in many instances; for it appears improbable that many persons contemplating such a transfer would anticipate this question and provide an answer to it in their contract. If they did not, it might be argued that since riparian privileges and rights which were good only as against the transferor would be of little benefit to the transferee, the transferor must have known that the transferee was bargaining for riparian privileges and rights which would be good as against the other riparians, and that his agreement to transfer riparian privileges and rights of that description should therefore be implied.

The transferor might, however, argue that under the plurality common law rule he himself could not have made use of the water for the benefit of his non-riparian land if such use was harmful to the other riparians; that since he himself lacked the privilege of harmful non-riparian use (see p. 140, ante), he could not transfer such a privilege to another (Note: 34 N.Car.L.R. 247,250 (1956); 5 Powell on Real Prop. 392-4 (1968); Gould v. Eaton, 117 Cal. 539,543; 49 P. 577 (1897); Kelly v. Nagle, 150 Md. 125, 132 A. 587,593 (1926)) because of the general principle that a man cannot transfer more than he has (1 Amer.L.Prop. 145 (1952); Duckworth v. Watsonville Water & Light Co., 150 Cal. 520,6; 89 P. 338 (1907); Taylor v. Armiger Body Shop, 40 Del.Ch. 22, 172 A.(2d) 572,3 (1961)); that since a man is presumed to know the law, the transferee was chargeable with knowledge of these rules, and could not therefore have reasonably expected that the transferor was contracting to do what was legally impossible, and should have understood that he was merely waiving his riparian privileges and rights to such an extent as to release the transferee from liability to the transferor for harm caused him by their exercise by the transferee (Bingham, California Law of Riparian Rights, 22 Cal.L.R. 251,268 (1934)), or was merely estopping himself from asserting such liability (1 Rogers & Nichols, Water for California 247-8 (1967)), or if the transaction be viewed as a real transfer as seems possible (Allerton v. N.Y., Lackawanna & West. Ry. Co., 199 N.Y. 489,495-6; 93 N.E. 270 (1910) & Calif. Pastoral & Agric. Co., Ltd. v. Madera Canal & Irrig. Co., 167 Cal. 78,86; 138 P. 718 (1914) in which all three theories are used cumulatively), he was at most purporting to transfer riparian privileges and rights good only as against himself according to authorities cited above, and that therefore the transferee had acquired all that he had bargained for, and so was not entitled to a refund of the purchase price.

If by way of rejoinder the transferee contended that as he was in fact unaware of the legal rules cited by the transferor, he was bargaining for riparian privileges and rights good as against other riparians; that he had not gotten what he bargained for; that his payment of the price was made under mistake as to the law; and that in view of these considerations he should be allowed to recover the money he had paid, the transferor might argue that even if what the transferor had acquired was less than what he bargained for, money paid under a mistake of either fact or law for an interest in land which it turns out the transferor does not possess is not recoverable after the transferee has accepted the instrument of transfer because the transferor's obligation to convey the interest bargained for is merged in the instrument of transfer unless it contains covenants for title (Contract Restat., sec. 413 (1932); 4 Williston on Contracts (rev. ed.), sec. 926 (1936); Restat. of Restitution, secs. 24(2) & 52(2) (1937); III Amer.L.Prop. 455 (1952); Dunham, Modern Real Estate Transactions 598 (1958); Wheeler v. State, 190 N.Y. 406,83 N.E. 54 (1907)), and that the instrument executed by the transferor did not. As to whether this rule has been changed in California by statute see the cases cited in 15 Cal.L.R. 53 (1926).

Even if the instrument of transfer contained covenants for title by the transferor, it is not clear that the transferee would be able to recover what he had paid in an action for breach of the covenants. Although they will protect the transferee against the consequences of the merger in the instrument of transfer of the transferor's obligation to convey privileges and rights of the sort agreed upon by the parties, which merger, as pointed out above, normally occurs in the absence from the instrument of transfer of covenants for title, unless the description of the privileges and rights in that instrument were so phrased as to make it clear that they were to be good as against third parties, the transferee might find it difficult to establish a breach of the covenants for title. Since these covenants are construed with reference to the privileges and right which the other parts of the instrument purport to convey (4 Tiffany on Real Prop. (3d ed.) 147 (1939)), they do not furnish an answer to the question as to the extent of the privileges and rights which the parties had agreed were to be conveyed, unless a description of them is included in the covenants themselves, which would be unusual. Thus it could be argued in a case in which the instrument included covenants for title, as it could in a case in which it did not, that the transferor had merely agreed to transfer what the law would allow him to transfer: viz., privileges and rights to use the water for the benefit of non-riparian land which would be good only as against him. See generally as to covenants for title, 4 Tiffany on Real Prop., secs. 999-1018 (1939).

The author has not as yet found a court opinion affording a definite answer to the question as to whether a transferee of riparian privileges and rights without the riparian land to which they were incident can recover the price he paid for them if he finds himself unable to enjoy them because of the invocation by riparian owners of the plurality common law rule that harmful non-riparian use is unlawful.

- 954 - The transferor cannot prevent his transferee from exercising for the benefit of non-riparian land the privileges and rights which the transferor had purported to convey (see authorities cited in fn. 944, ante); and there is authority for the correlative proposition, stressing the injustice of a contrary rule, that the transferee can prevent their exercise by the transferor. See *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 217; 110 P. 927 (1910) in which the court said: "A man may not eat his cake and have it. A man who sells a right to do a thing cannot thereafter exercise the right himself..." See also 1 *Roger & Nichols, Water for California* 248 (1967) & *Holmes v. Nay*, 186 Cal. 231, 199. 325, 9 (1921).
- 955 - See *Hutchins, California Law of Water Rights* 194 (1956) & fn. 951, ante.
- 956 - See p. 227 & fn. 952, ante.
- 957 - That riparian land ordinarily loses its status as such when it loses contact with the water by conveyance see 1 *Wiel, Water Rights* (3d ed.) 837 (1911); *Riparian Lands*, 5 *S.Car.L.Q.* 178, 9 (1952); VI-A *Amer.L.Prop.*

160 (1952); Note: 34 N.Car.L.R. 247,8 (1956); Mann, Ellis & Krausz, Water-Use Law in Illinois 16-7 (1964); 1 Rogers & Nichols, Water for California 247 (1967); Davis, Australian & American Water Allocation Systems Compared, 9 Bost.Coll.Ind. & Com'l.L.R. 647,681 (1868); 5 Powell on Real Prop. 374 (1968); Guerard, The Riparian Rights Doctrine in South Carolina, 21 S.Car.L.R. 757,762 (1969); St. Anthony Falls Water-Power Co. v. City of Minneapolis, 41 Minn. 270,3; 43 N.W. 56 (1889); N.Y. Central & Hudson River Rr. Co. v. Aldridge, 135 N.Y. 83,95; 32 N.E. 50, 17 LRA 516 (1892); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 331; 88 P. 978 (1907); Yearsley v. Cater, 149 Wash. 285,8; 270 P. 804 (1928); Harrell v. City of Conway, 224 Ark. 100, 271 S.W.(2d) 924,9 (1954); Roberts v. Lehigh Valley Rr. Co., 23 A.D.(2d) 507, 255 N.Y.S.(2d) 191 (1965); and Thompson v. Enz, 379 Mich. 667, 154 N.W.(2d) 473,481 (1967).

958 - See p. 228 & fn. 953, ante.

959 - See pp. 227-8, ante.

960 - For a recommendation that the conveyancing rules as to the effect on water rights of dividing riparian tracts "should be harmonized and unified" see Ohrenscha11 & Imhoff, Water Law's Double Environment: How Water Law Doctrines Impede the Attainment of Environmental Enhancement Goals, 5 Land & Water L.R. 259,289 (1970).

961 - As to the California position and the bases for it see 1 Roger & Nichols, Water for California 225 & 247 (1967); Strong v. Baldwin, 154 Cal. 150, 97 P. 178, 181 (1908); Miller & Lux, Inc. v. J.G. James Co., 179 Cal. 689,178 P. 716 (1919); & Rancho Santa Margarita v. Vail, 11 Cal. (2d) 501,81 P. (2d) 533, 552 (1938). Authority for upholding B's claim is also afforded by St. Anthony Falls Water Power Co. v. City of Minneapolis, 41 Minn. 270,3; 43 N.W. 56 (1889); but it should be noted that while the court asserted that the result reached was "in accordance with principle and common sense", it did not explain how that result could be reconciled with the generally accepted rule that land cannot qualify as riparian unless it has contact with the water, or with the rule prevalent in some states that transfers of riparian privileges and rights by a riparian owner to a non-riparian are not valid as against third parties.

962 - For authorities supporting this rule see fn. 957, ante.

963 - While Hudson v. Dailey, 156 Cal. 617,624-5; 105 P. 748 (1909) is justifiably cited in Hutchins, California Law of Rights 195 (1956) as taking the position that the part of the riparian tract conveyed by A to B would retain its riparian character and that B would acquire riparian privileges and rights, even though they were not referred to in the deed, provided that the circumstances showed that the parties so intended, it should be noted that the later case of Rancho Santa Margarita v. Vail, 11 Cal. (2d) 501,81 P.(2d) 533,552 (1938) is correctly cited in 1 Rogers & Nichols, Water for California 249-250 (1967) for the proposition that

preservation of the riparian character of B's part cannot be achieved and that B cannot acquire riparian privileges and rights unless they are specifically conveyed in his deed. As the court in Vail does not discuss or even mention Hudson, it would not be unreasonable to assume that the court which decided Vail doubted that the court which decided Hudson had correctly stated the California law. That Hutchins, however, apparently prefers not to make this assumption see Hutchins, Irrigation Water Rights in California, Calif.Agric.Exper.Station Circular 452 Revised 21 (1967) where he adheres to the position taken in his earlier writing. But, regardless of the validity of this assumption, a hard and fast rule that B cannot acquire riparian privileges and rights unless his deed expressly purports to transfer them does not appear to be desirable. Suppose that A had always used all of his riparian tract for agricultural purposes; that at the time of his conveyance to B there were ditches leading from the stream to the part of the tract conveyed to B; that B's part could not be successfully used for agricultural purposes without irrigation water from the stream; and that A knew that B intended to use the part conveyed to him for such purposes. It would seem that under these circumstances there could be implied a transfer of the riparian privileges and rights originally incident to the part conveyed to B even though the deed was silent with respect to them. A provision consistent with this conclusion and with Hutchins' interpretation of the California law has, therefore, been included in the legislation recommended. See instance 3, p. 222, ante.

964 - See *Gould v. Eaton*, 117 Cal. 539, 543; 49 P. 577 (1897) & authorities cited in fn. 953, ante.

965 - See pp. 235-241, post.

966 - 379 Mich. 667, 154 N.W.(2d) 473, 482-3 (1967).

967 - As to the position of the other riparian owners under the California cases allowing B to use the water for the benefit of his non-riparian land, the California court has said: "They have the same right that they had before the transfer, neither more nor less." - *Miller & Lux, Inc. v. J.G. James Co.*, 179 Cal. 687, 178 P. 716, 7 (1919).

968 - See the quotation from *Holmes v. Nay*, 186 Cal. 231, 199 P. 325, 7 (1921) set forth at p. 141, ante.

969 - See p. 142, ante.

970 - See authorities cited in fns. 677 & 952, ante.

971 - See authorities cited in fn. 953, ante.

972 - 150 Cal. 520, 89 P. 338 (1907).

973 - 150 Cal. 520, 524-5; 89 P. 338 (1907).

974 - 150 Cal. 520, 526-7; 89 P. 338 (1907).

- 975 - Although the court did refer to certain facts in regard to the flow of water tending to indicate that the defendant might be prejudiced by the substitution of the Duckworth riparian tract for the Grimmer riparian tract as the beneficiary of Grimmer's riparian privileges and rights, the court made no finding to that effect.
- 976 - The arguments made here are a condensed version of those previously offered in support of the recommendation that legislation be enacted authorizing harmful non-riparian use in several situations, provided certain conditions imposed for the protection of third parties are fulfilled. See pp. 226-234, ante.
- 977 - 226 N.Y. 38, 123 N.E. 200 (1919).
- 978 - 226 N.Y. 38,49; 123 N.E. 200 (1919).
- 979 - See, for example, in addition to the United Paper Board case, *Rood v. Johnson*, 26 Vt. 64,71 (1853); *Walker v. Lillingston*, 137 Cal. 401, 70 P. 282 (1902); *New England Cotton Yarn Co. v. Laurel Lake Mills*, 190 Mass. 48,53; 76 N.E. 231 (1906); *Forest Lakes Mut. Water Co. v. Santa Cruz Land Title Co.*, 98 Cal.App. 489,277 P. 172,5 (1929); *Dana S. Courtney Co. v. Quinnehtuk Co.*, 303 Mass. 48,20 N.E.(2d) 399 (1939); *Hite v. Town of Luray*, 175 Va. 218,8 S.E.(2d) 369 (1949); and *Locke v. Yorba Irrig. Co.*, 35 Cal.(2d) 205,217 P.(2d) 425 (1950).
- 980 - In none of the cases cited in fn. 979 did the court have to consider the effect of objection to the severance and transfer by third parties.
- 981 - 197 Ok. 499,172 P.(2d) 1002,5 (1946).
- 982 - 76 Vt. 240,56 A. 1106 (1904); 82 Vt. 505,74 A. 94 (1909).
- 983 - Although the author has thus far found no judicial utterance which is explicitly to the effect that the harmful exercise of a water use privilege for the benefit of riparian land other than that to which the privilege is incident is no more protectible than is a harmful non-riparian use, the language in the Duckworth and Holmes opinions, including that quoted at pp. 141 & 233-4, ante, indicates that the California courts might reach such a conclusion. In view of this possibility, and of the further possibility that the New York courts might be influenced by the language of the California cases, the inclusion in the statute recommended at this point of express recognition of the protectability of the privileges of user authorized by the statute would seem to be advisable. See fn. 936, ante.
- 984 - It is recommended hereinafter that the legislation proposed at this point be complemented by a statute expressly authorizing a riparian owner to effect the reservation involved in instance 2 and to make the transfer involved in instance 3. See pp. 258-260, post.

985 - See p. 223, ante.

986 - See p. 238, ante.

987 - A severance from riparian land of a riparian right as distinguished from a riparian privilege would occur if a riparian owner should give up the right that the exercise of one of his riparian privileges should not be unreasonably interfered with, as, for example, if riparian owner, L gave permission to U, an upper riparian owner, to pollute the stream to an unreasonable degree. While the severed right would be transformed into a privilege in U's hands, it would reassume its original character as a right in the hands of L if U should subsequently waive the permission. When clarity will be served by preserving a distinction between privileges and rights, the term "privilege", in conformity with Prop. Restat. usage, will be employed in this report to denote a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act, while the word "right" will be employed to denote a legally enforceable claim of one person against another that the other shall do a given act or shall not do a given act. See Prop. Restat., secs. 1 & 2 (1936). As approving the maintenance of this distinction in water cases see Kinyon & McClure, *What Can a Riparian Proprietor Do?*, 21 Minn.L.R. 512,514 (1937), quoted in 5 Powell on Real Prop. 350 (1968). Readers of the opinions in water cases should bear in mind, however, that the courts often employ the word "right" to denote a legal freedom to act as well as to denote a legal claim with respect to the acts of others. The distinction between privileges and rights is also discussed in Hohfeld, *Fundamental Legal Conceptions* (1923) and Bennett, *Some Fundamentals of Legal Interests in Water Supplies*, 22 Sou.Cal.L.R. 1 (1948).

988 - The view that because a riparian owner cannot himself exercise riparian privileges and enforce riparian rights for the benefit of non-riparian land (see p. 140, ante), and because a man cannot transfer an interest which he himself does not have (see authorities cited in the 3d par. of fn. 953, ante), a riparian owner cannot make a transfer to a non-riparian of riparian privileges and rights which will be valid as against third parties, although it will be effective as against the transferor, appears to have majority support. See in addition to the authorities cited in the 3d par. of fn. 953, ante the following: Trelease, *Coordination of Riparian & Appropriative Rights*, 33 Tex.L.R. 24,56-7 (1954); Haber & Bergen, *Water Allocation in the Eastern U.S.* (chap. by Arens) 401 (1958); Reis, *Connecticut Water Law* 46-9 (1967); & Hutchins, *Irrigation Water Rights in California* (Calif. Agricul. Exper. Station, Circular 452 Revised) 22 (1967). It should be borne in mind, however, that whether or not the majority view applies to severances from riparian land of the riparian privilege of access to navigable water is not entirely clear; for while this privilege has often been held or declared to be severable (2 Tiffany on Real Prop. (3d ed.) 723-4 (1939); *Simons v. French*, 25 Conn. 346 (1856); *Parker v. West Coast Packing Co.*, 17 Or. 510,21 P. 822 (1889); *Hanford v. St. Paul & Duluth Rr. Co.*, 43 Minn. 104,42 N.W. 596, 44 N.W. 1144,7 LRA 722 (1890); *Hastings v. Grimshaw*, 153 Mass. 497,27 N.E. 521,12 LRA 617 (1890); *Barri v. Schwarz Bros.*,

93 Conn. 501, 107 A. 3 (1919); *Walz v. Bennett*, 95 Conn. 537, 111 A. 834 (1920); *Nelson v. DeLong*, 213 Minn. 425, 7 N.W. (2d) 342 (1942); *City of N.Y. v. Third Ave. Ry.*, 294 N.Y. 328, 244-5; 62 N.E. (2d) 52 (1945) - *Semble* - for digest of this case see p. 236, 237, post; *Mianus Realty Co. v. Greenway*, 151 Conn. 128, 193 A.(2d) 713 (1963); *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.(2d) 678 (1965); *Norfolk Dredging Co. v. Radcliff Materials, Inc.*, 264 F.Supp. 399 (1967) & *Maloney, Plager & Baldwin, Water Law & Administration - The Florida Experience* (1968) in which it is said at p. 95 in regard to several Florida cases involving the riparian privilege of access: "Implicit in the cases discussed...is the notion that riparian rights are severable from ownership of the fee in the upland."), the author has thus far found but one case (*Hanford*, supra) in which the court appears to have given thought to the question as to whether a severance of the access privilege would be valid as against third parties; and no case in which it was held that the access privilege is not severable as against third parties. Since the court said in *Hanford* at pp. 119-120: "The rights of no one are affected by allowing the riparian owner to convey away this part of his property...No one is interested in opposing such unrestricted alienability and use...No one but the owners of the original riparian estate can question the rights of the purchasers.", it seems reasonable to infer that the court believed that a severance of the access privilege would be effective as against third parties because they could not conceivably be prejudiced by it. But this would seem to be too optimistic an appraisal of the possibilities; for the original owner of a severed privilege of access may have been exercising it in such a way as to cause harm to other riparian owners by interfering somewhat with their enjoyment of their privileges of access, as he would be entitled to do, provided his interference was not unreasonable in extent (2 *Tiffany on Real Prop.* (3d ed.) 717 & 721 (1939); *Rosema v. Construction Materials Corp.* 258 Mich. 457, 243 N.W. 24 (1932); *Causey v. Gray*, 250 Md. 380, 243 A(2d) 575, 581 (1968)); and even though the present holder of the severed access privilege exercised it in the same way as did his predecessor, other riparians would suffer harm, and the question would arise as to whether they had to endure that harm because the severance of the access privilege was valid as against them. It would seem reasonable to assume that in any state adhering to the majority rule that any severance of a riparian privilege or right which results in harm to third parties is invalid as to them would be applied to a severance of the access privilege in any case in which the severance caused them harm. Of course in a state adhering to the minority view that the severance from riparian land of riparian privileges and rights in general is valid as against third parties, because the party holding the severed privilege or right can, like his predecessor, exercise or enforce it only to a reasonable extent. (For authorities supporting this view see the last par. of this note.) The validity as against third parties of the severance of the access privilege would follow as a matter of course. As to the theories on which the validity of the transfer against the transferor has been predicated see the 3d par. of fn. 953, ante. In states in which the majority view prevails it

appears to be applicable to reservations of riparian privileges and rights from grants of riparian land as well as to transfers of such interest. See *Water Resources & the Law* (chap. by Lauer) 432 (1958); 1 Rogers & Nichols, *Water for California* 248 (1967) & 5 Powell on Real Prop. 394 (1968). While it is correctly said in *Hutchins, California Law of Water Rights* 193 (1956) that in *Walker v. Lillingston*, 137 Cal. 401, 70 P. 282 (1902) such a reservation was upheld "under attack by opposing parties", it should be noted that the attack was made by the grantee of the riparian land from whose grant part of the riparian privileges and rights had been reserved rather than by a third party such as another riparian.

A few courts have gone so far as to make statements which, if literally interpreted, could be taken as declarations that a purported transfer of a riparian privilege or right to a non-riparian is not valid as against anyone; even as against the transferor. Thus in *Harvey Realty Co. v. Borough of Wallingford*, 111 Con. 352, 150 A. 60, 3 (1930) the court said that "any attempted transfer of the right made by a riparian to a non-riparian proprietor is invalid." And in *Thompson v. Enz*, 379 Mich. 667, 154 N.W.(2d) 473, 483 (1967), a case involving an attempt by a riparian owner to transfer riparian privileges and rights to non-riparians, the court took the position that while the attempt was effective as against the transferor to the extent of creating in his transferees easements of access to the lake over his land, it was not effective to pass to the transferees any riparian privileges or rights, even as against him.

Among the authorities supporting what is apparently the minority view that transfers of riparian privileges and rights can be effective not only as against the transferor but against third parties as well are *Smith v. Stanolind Oil & Gas Co.*, 179 Ok. 499, 172 P.(2d) 1002, 5 (1946); *State v. Apfelbacher*, 167 Wis. 233, 167 N.W. 244 (1918), and *Lawrie v. Silsby*, 76 Vt. 240, 56 A. 1106 (1904); 82 Vt. 505, 74 A. 94 (1909) which takes the position that a transfer to a non-riparian will be effective against third parties to an extent which is reasonable under all the circumstances. As substantially to the same effect as *Lawrie* see *Bartlett v. Stalker Lake Sportsmen's Club*, 283 Minn. 393, 168 N.W.(2d) 356, 361 (1969) in which the court held that a riparian owner could transfer to the public by dedication the riparian privilege of duck hunting on a small lake in which there were no fish and which was not suitable for boating or swimming but only for duck hunting; and that the other riparians on the lake could not complain because the public would not be allowed to exercise its hunting privilege in such a way as to interfere unduly with their enjoyment of the lake.

989 - 226 N.Y. 38, 123 N.E. 200 (1919). For discussion of the bearing of this case on the question as to whether it would be lawful to exercise riparian privileges and to enforce riparian rights incident to riparian tract X for the benefit of riparian tract Y see p. 235, ante.

990 - 226 N.Y. 38, 41-2; 123 N.E. 200 (1919).

- 991 - 226 N.Y. 38, 46-9; 123 N.E. 200 (1919).
- 992 - *Indeed Lawrence v. Whitney*, 115 N.Y. 410,423; 22 N.E. 174,5 LRA 417 (1889); *Matter of City of N.Y. (W.205th St.)*, 240 N.Y. 68,72; 147 N.E. 361 (1925) & *Water Power & Control Comm. v. Niagara Falls Power Co.*, 262 A.D. 460,4; 30 N.Y.S. (2d) 371 (1941); *affd.*, 289 N.Y. 353, 45 N.E. (2d) 907 (1942) can reasonably be interpreted as going even farther by supporting the well established rule that riparian privileges and rights, unless expressly reserved, pass by a conveyance of the riparian land to which they are incident, even though they are not referred to in the deed. See 3 Farnham, *Law of Waters*, sec. 723 (1904); 2 Tiffany on Real Prop. (3d ed.) 724 (1939); 1 Rogers & Nichols, *Water for California* 455 (1967); 5 Powell on Real Prop. 393 (1968); *Hanford v. St. Paul & Duluth Rr. Co.*, 43 Minn. 104,121; 42 N.W. 596, 44 N.W. 1144,7 LRA 722 (1890); *Walz v. Bennett*, 95 Conn. 537,111A. 834,6 (1920); *Sawyer v. Shader*, 321 Mass. 725,7; 75 N.E.(2d) 647 (1947); *Thurston v. City of Portsmouth*, 205 Va. 909,140 S.E.(2d) 678,682 (1965). That a grantor of riparian land can, when conveying it, prevent his grantee from receiving riparian privileges and rights by excepting or reserving them is well established. See the authorities cited in fn. 949, ante. As to whether the reserved privileges and rights would be good as against third parties see the 1st par. of fn. 988, ante.
- 993 - 294 N.Y. 238,62 N.E.(2d) 52 (1945).
- 994 - 294 N.Y. 238,244-5; 62 N.E.(2d) 52 (1945).
- 995 - In *Crance v. State of N.Y.*, 284 A.D. 750,136 N.Y.S.(2d) 156 (1954); *revd. on other grounds*, 309 N.Y. 680,128 N.E.(2d) 324 (1955) it appeared that the plaintiff, the owner of land riparian to Seneca Lake, conveyed to a railroad in fee a strip of land 66 feet in width along the shore of his riparian tract, which strip was partly above and partly below the water of the lake and deprived the plaintiff of all lake frontage. It also appeared that the plaintiff, when conveying the strip, reserved to himself all of his riparian privileges and rights, and that the court recognized that the plaintiff, despite his conveyance of the strip, "had the right to cross the railroad right of way to go to the water". If the part of the plaintiff's land which was deprived of contact with the water by his conveyance of the strip to the railroad became non-riparian as a result of such conveyance under the rule that to qualify as riparian land must have contact with the water (see authorities cited in fn. 957, ante), it follows that the court held that the access privilege could be severed from the riparian land to which it was incident and reserved for the benefit of non-riparian land; and that *Crance* could be cited as basically in accord with the dictum in *Third Ave.* quoted in the text. As the court did not, however, express an opinion on this point in *Crance*, or even refer to it, it seems doubtful that *Crance* could properly be so cited. It could be argued that this doubt should be resolved against the assumption that the land retained by the grantor in *Crance* became non-riparian in view of

the court's statement in *N.Y. Central & Hudson River Rr. Co. v. Aldridge*, 135 N.Y. 82,95; 32 N.E. 50,17 LRA 516 (1892) as to the effect of a conveyance to the railroad of a strip of land along the shore. The court said: "The conveyance to the railroad of the strip in question is in its effects entirely unlike the conveyance to a private individual in fee simple. In the latter case it may well be, the grantor even of so narrow a strip would lose his character of riparian owner and the grantee would acquire it. But when we consider the purpose of the conveyance to the railroad and the limitations to its use which the statute itself placed upon the company, it becomes entirely plain that the grantor ought not to lose his character of riparian owner where he retains the property immediately adjoining that which he conveys...Grants of land under water were authorized to be made to the upland proprietor for the purpose of promoting the commerce of the state. A railroad company authorized only to do the business provided by its charter as a railroad, could certainly not within the meaning of the acts, promote the commerce of the state and hence would not come within the class of persons named by the acts conferring power to convey lands under water for the purposes named therein...The limitation placed by the statute upon the use of this strip of land by the railroad company, precludes the ordinary consequences from attaching to a conveyance in fee of land. The grantor still remains the owner of the adjoining upland within the meaning of the statute and he or his grantees are the persons to whom a grant of land under water may properly and legally be made." On the other hand it could be pointed out that in *Aldridge* the court was not passing on the effect at common law on the character of retained land of a conveyance of a shoreland strip to a railroad, but was rather determining the effect of such a conveyance on the retained land under a statute authorizing the conveyance by the state of its land under navigable water to owners of the adjoining upland; and it could be argued therefore that it cannot be assumed that because the court in *Aldridge* concluded that the defendant remained an upland owner within the meaning of the statute, despite his conveyance of the shoreland strip, it would hold that the defendant's retained land continued to be riparian in a case not affected by the statute, even if the grantee of the shoreland strip was a railroad. The possibility that this argument might be found persuasive by the Court of Appeals is virtually precluded, however, by the citation of *Aldridge* in *Matter of City of Buffalo*, 206 N.Y. 319,329; 99 N.E. 580 (1912) as establishing "that when a railroad company acquires a right of way which intervenes between a navigable body of water and the adjacent upland, the owner of the upland retains all the riparian rights he had before the railroad was built. In such a case the railroad right of way, whether acquired by proceedings in invitum or by deed in fee, is held only for the specific purposes served by the construction and operation of railroad tracks, and does not include the riparian rights which are incident to the ownership of uplands as that term is generally understood." Also of interest in this connection are the Florida cases discussed in secs. 34.1-34.3 of *Maloney, Plager & Baldwin, Water Law & Administration - The Florida Experience* (1968).

- 996 - 347 U.S. 239, 74 S.Ct. 487, 98 L.Ed. 666 (1953).
- 997 - Hydraulic Power Co. of Niagara Falls v. Pettebone-Cataract Paper Co., 198 A.D. 644, 6; 191 N.Y.S. 12 (1921).
- 998 - 202 F.(2d) 190, 207 (case 2); 91 App.D.C. 395 (1952). As the contention of the FPC that Pettebone possessed no power privilege was apparently founded at least in part on the false assumption that Hydraulic owned no riparian land and therefore had no riparian power privilege to convey to Pettebone rather than on the theory that even if Hydraulic had such a privilege it could not sever it from its riparian land and transfer it to a company owning no riparian land, it was not strictly necessary for the court to pass on the validity of the severance and transfer. It nevertheless elected to do so.
- 999 - 347 U.S. 230, 246-7; 74 S.Ct. 487, 98 L.Ed. 666 (1953).
- 1000 - 262 A.D. 460, 30 N.Y.S.(2d) 371 (1941); *affd.*, 289 N.Y. 353, 45 N.E. (2d) 907 (1942). In this case the Appellate Division quoted with approval the statement in the United Paper Board opinion that the right to the use of water can be severed from the riparian land by grant, condemnation or prescription.
- 1001 - In *City of Syracuse v. Stacey*, 169 N.Y. 231, 246; 62 N.E. 354 (1901) the court by way of dictum stated that a power privilege "could not be severed from the land". In view of the context in which this statement was set, it seems probable that the court meant merely that a power privilege could not be enjoyed unless its owner had some land for the benefit of which the privilege could be used. If, however, the court intended to express the idea that such a privilege could not be severed from one tract of land and conveyed to the owner of another tract for use in connection with it, *United Paper Board, Third Avenue and Niagara Mohawk* have clearly overruled *Stacey* on this point.
- 1002 - The same thing could be said as to the opinions of courts in some other states containing general declarations affirming the transferability of riparian privileges and rights. See, for example, *Gibbs v. Sweet*, 20 Pa.Super. 275, 282-3 (1902) in which the court said: "Whatever may be the rights of the riparian owner they are subject to his disposition as are other parts of his land, he may reserve them out of a grant, convey them and retain the land, he may reserve them out of a grant, convey them and retain the land, or by grant or devise sever one from another...", but expressed no opinion as to the validity of the severance as against third parties. That transfers of riparian interests might not be good against them, however, may perhaps be indicated by the quotation from the Pennsylvania case set forth in fn. 1043, *post*. That the law as to the transferability of riparian interest is one of the most obvious uncertainties in the water law of that state see *Dall, Legal Aspects of Water Resources Planning, Proceedings Pa. State Water Resources Law Colloquium 1, 13 (1967)*. See also cases cited in fn. 979, *ante*.

1003 - For the court's statements see p. 243, ante.

1004 - The same implication might be drawn from the following statement in *Allerton v. N.Y., Lackawanna & West. Ry. Co.*, 199 N.Y. 489, 495-6; 93 N.E. 270 (1910):

"The right given to the defendant, to change the course of the river...was one which Hewlett was competent to convey. The owner of land may impose upon it any burden...not inconsistent with his general right of ownership, if such burden is not in violation of public policy, and does not injuriously affect the property rights of others."

since its last two clauses point out that the extent of a privilege conveyed by a riparian owner cannot be so great as to infringe the rights of the state or of private third parties, and since if the transferred privilege is so limited, there is no good reason why it should not be held valid as against third parties.

A similar interpretation could be put upon certain statements of the New York Court of Appeals in *Loch Sheldrake Associates v. Evans*, 306 N.Y. 297, 303-4; 118 N.E.(2d) 444 (1954) in which it appeared that Divine, the owner of all of the bed and shores of Loch Sheldrake, "a natural lake or pond", and of a mill located on a lot "south of" the pond but not riparian to it, had erected a dam on the outlet of the pond, and had drawn water from the pond through a pipe for the use of his mill; that later he conveyed the bed and shores of the pond to Greenspan, the predecessor of the plaintiff, by a deed reserving to Divine the privilege of maintaining the dam and of drawing water from the pond, but which did not state the purpose for which the privilege was to be exercised; that subsequently Divine conveyed the reserved privilege and the mill lot to the predecessor of the defendant, who claimed that it was lawful for her to exercise the privilege for the benefit of her hotel situated on land half a mile from the pond, while the plaintiff insisted that it could be exercised only for the benefit of the mill lot. In deciding this issue for the defendant the court said inter alia: "We think that what...Divine reserved, and what...defendant...got by subsequent grant...was...an interest in the Loch Sheldrake lands, in the nature of a right to take a 'profit' from those lands (see *Huntington v. Asher*, 96 N.Y. 604,609;...). Such a right, not appurtenant to any other lands, may be used by its owner at any place or in any manner. As the Supreme Judicial Court of Massachusetts pointed out in *Goodrich v. Burbank*, 94 Mass. 459,462: 'Rights of water duly granted by deed, not appurtenant to any particular parcel of land, may be used by the owner at any place or in any manner, so long as he does not interfere with or impair the rights of others'." As the water in the pond was entirely surrounded by land owned by the plaintiff's predecessor at the time the reservation was made, he could properly be treated as the owner of the water and not merely as owner of riparian privileges and rights in it; therefore the privilege to take the water from the pond could be properly classified as a profit, which is a privilege to appropriate from the land of another something which is part of the land (3 *Tiffany on Real Prop.* (3d ed.), secs. 839 & 840 (1939)), as water is held by the courts to be for many legal purposes.

It would seem reasonably clear, however, that the court in *Loch Sheldrake* could have viewed the reservation of a privilege to take water as the creation in the grantor of a riparian privilege of use by separating it from the other privileges and rights which in the aggregate constituted the complete ownership of the pond water acquired by the plaintiff. As to the close relationship which sometimes exists between easements and profits on the one hand and riparian privileges and rights on the other see *Beck, Governmental Refilling of Lakes & Ponds*, 46 *Tex.L.R.* 180,5 (1967) for references to cases the opinions in which contain language which would enable the riparian privilege of access to navigable water to be treated as an easement, and the riparian privilege of fishing as a profit a prendre. As indicative of the fact that the courts of states other than New York have on occasion shown no awareness of the possibility of interpreting the grant of an easement or profit with respect to water as the transfer of a riparian interest see *Akron Canal & Hydraulic Co. v. Fontaine*, 72 *Oh.App.* 93,50 *N.E.(2d)* 897,901 (1943) in which the court seems to take the position that while riparian rights are not severable from riparian land, a riparian owner can grant a flowage easement to another riparian owner, although such a grant results not only in the receipt by the grantee of a privilege to obstruct the stream to a greater extent than he lawfully could except for the grant, but also in a surrender of the grantor's riparian right that the stream should not be so obstructed as to cause his riparian land to be flooded. That there is a division of opinion, however, as to whether the surrender of a riparian right can be viewed as a transfer of any riparian interest, see par. 3 of fn. 953, ante.

If the court in *Loch Sheldrake* had actually proceeded on the theory that the defendant was the holder of a riparian privilege of water use, that case could be cited in support of the proposition that a riparian privilege can be severed from the land to which it is incident and transferred to a non-riparian for the benefit of his non-riparian land, even though other riparians might interpose objections to the transfer, because the statement of the Massachusetts court, quoted with approval in *Loch Sheldrake*, that the exercise of the water privilege which the New York court classified as a profit, must be in such manner as not to "interfere with or impair the rights of others", would no doubt have been held applicable if the court had in *Loch Sheldrake* classified the defendant's privilege as a riparian privilege. While in *Loch Sheldrake*, as in *United*, no third party was interposing objections, because the plaintiff was the owner of all the land riparian to the pond, *Loch Sheldrake*, like *United*, could be interpreted as impliedly indicating that if the grant had been construed as the transfer of a riparian privilege and if there had been other riparian owners, their objections to the transfer could be overruled because the use of the privilege in the hands of the transferee would have to be so limited as to avoid infringement of the rights of third parties. Thus, if a New York court were to be confronted with a case in which it appeared that A and B were riparian owners on a lake, and that A granted to X, a non-riparian, the privilege of laying a pipe across A's land, and of withdrawing water from the lake, the court, regardless of whether it held that X was the grantee of a profit or of a riparian privilege, could go on to

hold that the grant to X was valid despite B's objections. In other words, just as the grant of a profit to take water can be good as against third parties to the extent that the interest transferred does not exceed the interest of the grantor, as indicated in *Loch Sheldrake*, so can the transfer of a riparian privilege apart from the riparian land to which it is incident be good as against third parties to the same extent. There is no more reason in the second case than in the first for invalidating the transaction because of the possibility that X might attempt to exceed the privilege.

1005 - For authorities taking this position see 1st par. of fn. 988, ante.

1006 - 294 N.Y. 238,244; 62 N.E.(2d) 52 (1945).

1007 - It is pointed out in Schwartz, *Water Rights Under the Federal Power Act*, 102 of Un. of Pa.L.R. 31,48 (1953) that New York State owns the riparian land abutting on the falls. According to *Peo. ex rel. Niagara Falls Hydraulic Power & Mfg. Co. v. Smith*, 70 A.D. 543, 4-5; 75 N.Y.S. 100 (1902); *affd. w.o.*, 175 N.Y. 469,67 N.E. 1088 (1903) the State of New York acquired land riparian to the Niagara River in 1883.

1008 - As to the basis for the FPC's attack on the validity of the Pettebone water rights see fn. 998, ante.

1009 - *Kahlen v. State of N.Y.*, 223 N.Y. 383,119 N.E. 883 (1918) is not helpful in the connection, for while it involved the acquisition by the state of riparian rights by eminent domain, the question as to the validity of a severance of such rights from riparian land was not involved, since the state acquired not only the riparian rights but also the riparian land to which they were incident. Nor is *Village of Champlain v. McCrea*, 165 N.Y. 264,59 N.E. 83 (1901) or *Matter of Gillespie*, 272 N.Y. 18,3 N.E. (2d) 618 (1936) of assistance. While in each of these cases there was a severance, because the municipality involved condemned water interests without taking the land to which they were incident, in neither case did any question arise as to the validity of the severance as against third parties.

1010 - As to the irrigation privilege under N.Y. common law see *Strobel v. Kerr Salt Co.*, 164 N.Y. 303,320; 58 N.E. 142 (1900); *Robinson v. David*, 47 A.D. 405,7; 62 N.Y.S. 444 (1900), *affd.* 169 N.Y. 577, 61 N.E. 1134 (1901); *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38,45; 123 N.E. 200 (1919). Under N.Y. Environmental Conservation Law sec. 15-0701 (see pp. 23-6, ante) the irrigator does not have to show that his withdrawals are reasonable unless the plaintiff proves that they are causing him harm.

1011 - Nor is the New York law as to the severability of consumptive water privileges made clear by *Peo. ex rel. Burnham v. Jones*, 112 N.Y. 597, 606; 20 N.E. 577 (1889) in which it was said: "Neither can it be doubted but that a riparian owner, conveying lands adjacent to navigable waters,

may so limit his grant as to reserve to himself not only his riparian privileges in the water, but also subsequent accretions to the soil formed by the operation of natural causes. This follows necessarily from the absolute right which the owner has to impose such terms and conditions upon his grants as he may deem necessary or proper.", for although the statement does not expressly exclude and is broad enough to include consumptive privileges, it was dictum as to them, since no consumptive privileges were involved in the case, and there is nothing in the opinion to indicate that the court's attention was directed to privileges of that type. And while in *Frontier Town Properties, Inc. v. State of N.Y.*, 58 Misc. (2d) 388,296 N.Y.S.(2d) 90 (Ct. of Cl., 1968) the court and the litigants seemed to assume that a riparian grantor's reservation of "all water rights and riparian rights of every name and nature in and to the West Branch of the Schroon River flowing through the lands above described, except that the party of the second part...may maintain the existing dam so long as the waters impounded thereby are not used for power purposes or the generation of electric energy" could be enforced with respect to any water rights within its scope, this assumption cannot be given much weight in connection with the problem at hand in view of the fact that the question before the court was as to the interpretation of the reservation's exceptive clause rather than the question as to whether the grantee had acquired consumptive privileges despite the reservation.

1012 - But power interests, when seeking the advantage given to consumptive uses by the Flood Control Act of 1944, contend that use of water for power is consumptive. (Bielefeld, *Navigability in the Missouri River Basin*, 4 Land & Wat. L.R. 97,107 (1969).)

1013 - 43 Minn. 104,42 N.W. 596,44 N.W. 1144, 7 LRA 722 (1890).

1014 - 43 Minn. 104, 119; 42 N.W. 596,44 N.W. 1144,7 LRA 722 (1890).

1015 - 43 Minn. 104,111; 42 N.W. 596,44 N.W. 1144,7 LRA 722 (1890).

1016 - 43 Minn. 104,119; 42 N.W. 596,44 N.W. 1144, 7 LRA 722 (1890). The following statements might also be interpreted as expressions of doubt as to the severability of consumptive water privileges from the riparian land to which they were originally incident. If a "riparian owner may grant to nonriparian owners the same rights that he has...he may admit as many to the same privileges as he pleases, and upon such terms as he pleases, even to the exhaustion of the stream." - *Irving v. Media Borough*, 10 Pa.Super. 132,144 (1899); affd. on opinion below, 194 Pa. 648,45 A. 482 (1900). "The general right to use and occupy the water may be severed from the upland...But a distinction is to be made between the different uses to which the water is to be put. The right to use water from the stream for domestic and irrigation purposes is strictly a riparian right, and cannot be utilized on the bed of the stream itself, and therefore it cannot be separated from the upland because of the physical impossibility of such a course. There is no doubt, however, that the owner of the riparian land might contract not to utilize such rights for the benefit of the owner of the stream, and such a contract would have practically the same effect as a separation of the right from the land...But a riparian proprietor cannot grant away his water rights apart from his estate so as to place the grantee in the same

position with respect to the other riparian proprietors as he occupied himself..." - 3 Farnham, Law of Waters 2201-2 (1904). "...it seems to be the general rule...that where the right transferred is one held in common with other riparians, as a right to make a consumptive use of the water or to pollute the waters, either of which has a substantial potential harmful effect upon other riparians, the exercise of such a right by a grantee may be attacked by a riparian who would be adversely affected thereby." - Water Resources & the Law (chap. by Lauer) 431 (1958).

"A riparian owner cannot extend the right to use water on non-riparian land either by purchasing the non-riparian land or presuming to convey to his non-riparian neighbor the right to use water without violating the rights of downstream riparians to the undiminished flow of the stream... A distinction should be made, however, between the consumptive use of water on non-riparian land and the transfer by a riparian owner of a right-of-way across his riparian land and an easement in the river for boating, bathing and fishing. In such a situation the water is used on the riparian property and lower riparian owners would have no grounds for valid complaint because such use would not likely affect the continued flow of the stream nor the quantity or quality of the water." - Lee, Acquisition of Riparian Rights in N.Y., 1964 Proceedings of Section of Mineral & Natural Resources Law, ABA, 13,14. The extract from Farnham, Law of Waters, appearing above in this footnote was quoted in *Hite v. Town of Luray*, 175 Va. 218, 8 S.E.(2d) 369 (1940), but it is not clear with how much approval.

- 1017 - 179 Ok. 499, 172 P.(2d) 1002, 5 (1946). See in apparent accord *State v. Apfelbacher*, 167 Wis. 233, 167 N.W. 244 (1918). See also Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1, 12 (1959); Johnson, Condemnation of Water Rights, 46 Tex.L.R. 1054, 1097 (1968); and Harnsberger, Eminent Domain & Water Law, 48 Neb. L.R. 325, 370 (1969) intimating that when a consumptive riparian water interest is acquired by eminent domain its extent will be determined by the quantum of the interest of the condemnee. "If the Illinois courts would generally allow such nonriparian use, they perhaps would hold that if the riparian owner conveys away all of his riparian rights, the grantee obtains a right of use measured by the extent of the grantor's riparian rights, that is, on the basis of his riparian land, his natural wants, and his just proportion of the water available for artificial uses." - Mann, Ellis, Krausz, Water-Use Law in Illinois, 25 (1964).
- 1018 - See the extract from the opinion in *United Paper Board* at p. 243, ante. Although the New York court did not use words identical with those employed in *Smith*, the New York court expressed the same idea that the Oklahoma court conveyed.
- 1019 - Although it seems to have been assumed by the court in *Village of Champlain v. McCrea*, 165 N.Y. 264, 59 N.E. 83 (1901) that consumptive riparian privileges are severable by eminent domain from the riparian land to which they are incident, the case can scarcely be cited as establishing that proposition because the question as to its validity was never before the

court. The condemnee's objection to the taking was not based on denial of that proposition, but rather on the ground that the property to be taken was insufficiently described; and the persons who would normally contest the proposition if anyone would, namely, the other owners of riparian land below the proposed diversion point were not parties to the action, since they had all voluntarily sold their riparian interests to the village.

1020 - As in *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 17 P. 535, 8 (1888).

1021 - As in *Kelly v. Nagle*, 150 Md. 125, 132 A. 587 (1926).

1022 - The list of such cases includes *Smith*, *Apfelbacher* and *Lawrie* cited in the 3d par. of fn. 988, ante; possibly *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E.(2d) 549 (1947); a few more referred to in 34 N.Car.L.R. 247, 251 (1956); and conceivably *United Paper Board and Hite* discussed in fn. 1023, post. Moreover, the Virginia court, by making the unqualified statement in a recent case that riparian rights are severable, and by including in its summary of riparian rights the right to make reasonable use of the water as it flows past the land, has provided at least some basis for the contention that consumptive riparian privileges are severable in Virginia. (See *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.(2d) 678, 680 (1965).) The privilege actually involved in this case, however, was apparently the privilege of access to navigable water.

1023 - It could be argued that as against the upper riparian owner in *United*, 226 N.Y. 38, 123 N.E. 200 (1919), who contracted in substance to allow more water to flow by him than the lower owner could have insisted on by virtue of the riparian land conveyed to him, the right which the lower owner received by virtue of the agreement was consumptive, even though conveyed for power purposes, since it diminished the quantity of water which would have been usable by the upper owner at common law as effectively as if he had authorized a riparian above him to divert a larger amount of water from the stream for irrigation purposes than he would have been entitled to at common law. And the same argument could be made with respect to the water right involved in *Hite v. Town of Luray*, 175 Va. 218, 8 S.E.(2d) 369 (1940), although originally conveyed for power purposes, especially since the water right ended up in the hands of a second transferee, a municipality, which might have been using it for public supply, though the opinion in the case does not indicate what use the town was making of the right it was held to have acquired by transfer. But as neither the *United* nor the *Hite* opinion contains the slightest intimation that the rights involved were consumptive, a party who advanced the argument above suggested in New York obviously could not be confident of its acceptance. It seems fair to conclude therefore that the New York courts might well take the position that the severability of consumptive water privileges and rights is an open question in New York.

- 1024 - Trelease, Policies for Water, 5 Nat.Res.J. 1,29-37 (1965); Tolley, Western Water Resources, 5 Nat.Res.J. 259,279 (1965); Kneese & Smith, Water Research (paper presented by W.H. Ellis, 1965) 233 (1966); Trelease & Lee, Transfer of Water Rights, 1 Land & Water L.R. 1,5 (1966); Neal King, Handling Riparian Rights in an Adjudication Act, 1966 Un. of Tex. Water Law Conf., 41; Champion, Prior Appropriation in Mississippi, 39 Miss.L.J. 1, 30-1 & 37 (1967); Morreale-Hanks, Law of Water in New Jersey, 22 Rutgers L.R. 621, 635-6 (1968); Plager, Law of Water Allocation as a Variable in Industrial Site Location, 1968 Wis.L.R. 673,680; Levi, Highest and Best Use: An Economic Goal for Water Law, 34 Mo.L.R. 165,174 (1969); Harnsberger, Eminent Domain & Water Law, 48 Neb.L.R. 325,370 (1969). Because of the variability principle comprised in the riparian doctrine (as to which principle see pp. 16 & 223, ante) and of the consequent uncertainty as to the extent which riparian privileges and rights might have at some future time, legislation authorizing their transfer would not, of course, remove all obstacles to their devotion to new uses. As to the advisability of restricting to some extent the operation of the variability principle in order to achieve a reasonable degree of reconciliation of the demands for certainty and flexibility see Farnham, Improvement of New York Water Law, 3 Land & Water L.R. 377, 410-411 (1968).
- 1025 - As in *United Paper Board Co. v. Irqquois Pulp & Paper Co.*, 226 N.Y. 38,123N.E. 200 (1919); or wishes to retain his riparian privileges and rights when conveying his riparian land as in *Frontier Town Properties, Inc. v. State of N.Y.*, 58 Misc.(2d) 388, 296 N. U.S.(2d) 90 (Ct. of Cl., 1968).
- 1026 - As in *Elliott v. Fitchburg Rr. Co.*, 64 Mass. 191 (1852).
- 1027 - "...if riparian rights to water may be reserved or conveyed to non-riparian land, a condemnor might acquire the rights to the amount of water to which the riparian condemnee would be entitled without being required to compensate other riparians. Development of such a "severability doctrine" under the riparian doctrine can be supported as necessary to remove obstacles to condemnation of water supplies and to facilitate the most economic development of water resources in riparian jurisdictions." - Harnsberger, *Eminent Domain & Water Law*, 48 Neb. L.R. 325, 370 (1969). See also Stoebeck, *Condemnation of Riparian Rights*, 30 La.L.R. 394, 415-6 (1970).
- 1028 - See the 1st par. of fn. 988, ante.
- 1029 - 1 Nichols on Eminent Domain (rev. 3d ed.) 40-1 (1964). The New York courts have accepted this theory in several cases. See *Vandermulen v. Vandermulen*, 108 N.Y. 195, 201-2; 15 N.E. 383 (1888); *Kahlen v. State of N.Y.*, 223 N.Y. 383,8; 119 N.E. 883 (1918); *Matter of Mazzone*, 281 N.Y. 139,146-7; 22 N.E.(2d) 315,23 ALR 1967 (1939); *Matter of Town of Hempstead v. Little*, 22 N.Y.(2d) 432,9; 239 N.E. (2d) 722, 293 N.Y.S. (2d) 88 (1968). They appeared, however, to follow another theory in the cases cited in fn. 1033, post.

- 1030 - If in a jurisdiction adhering to the rule that severances of riparian interests from riparian land are not valid as against third parties there is a case holding that the rule does not apply to severances effected by eminent domain, the author has not found it; and *San Joaquin & Kings River Canal & Irrig. Co. v. Stevinson*, 164 Cal. 221, 128 P. 924 (1912) could conceivably be interpreted as indicating that the rule does apply to such severances. Although the third party involved in this case based his claim against the condemnor on a prescriptive privilege he had acquired against the condemnee rather than on any riparian right, the statement of the court that the condemnation of a riparian owner's right would not give the condemnor "any right whatsoever as against any other person" (128 P. 930) is broad enough to be fairly citable for the proposition that a condemnation of a riparian owner's right apart from the land would not give the condemnor any right as against other riparian owners. While the comments on this case in *Rogers & Nichols, Water for California* (1967) do not include clear statements that it stands for this proposition, none of them appear to be inconsistent with it, and the one at p. 458 seems to imply that the case shows that in California the rule that a severance of riparian rights from riparian land is not valid as against other riparian owners applies to severances by eminent domain. Moreover, the passage from Harnsberger quoted in fn. 1027, ante, seems to indicate that in his opinion the rule would be applicable in the field of eminent domain. See also in apparent accord, *Trelease, Coordination of Riparian & Appropriative Rights*, 33 Tex.L.R. 24,57 (1954).
- 1031 - For statements of the general rule that a seller can convey no greater interest than he has see 1 Amer.L.Prop. 145 (1952); *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520,6; 89 P. 338 (1907); and *Taylor v. Armiger Body Shop*, 40 Del.Ch. 22, 172 A.(2d) 572.3 (1961). As indicating that this rule is applicable under the involuntary sale theory as to the consequences of eminent domain see 1 *Nichols on Eminent Domain* (rev. 3d ed.) 41 (1964).
- 1032 - Condemnation of water privileges and rights without condemning the riparian land to which they are incident is not uncommon in jurisdictions adhering to the riparian doctrine. See *Lee, Acquisition of Riparian Rights in N.Y.*, 1964 Proceedings, Section of Mineral & Natural Resources Law, ABA, 16; *Village of Champlain v. McCrea*, 165 N.Y. 264,59 N.E. 83 (1901); *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson*, 164 Cal. 221, 128 P. 924 (1912); *Matter of Gillespie*, 272 N.Y. 18,3 N.E.(2d) 618 (1936).
- 1033 - 1 *Nichols on Eminent Domain* (rev. 3d ed.) 36-7 (1964) with quotation from *Norman Lumber Co. v. U.S.*, 223 F.(2d) 868, 870 (1955). This theory appears to have been employed by the New York courts in *Matter of Union Elevated Ry. Co.*, 112 N.Y. 61,74; 19 N.E. 664 (1889) and in *Gates v. De La Mare*, 142 N.Y. 307,312; 37 N.E. 121 (1894); and the New York legislature's choice of language has on some occasions apparently been influenced by it. See L. 1097, c. 371 referred to in *Onondaga Water Service Corp. v. Crown Mills, Inc.*, 132 Misc. 848,230 N.Y.S. 691 (1928)

which required the corporation to "extinguish" the riparian rights of riparian owners on Otisco Lake before exercising the power granted to it by the statute to withdraw water from the lake.

- 1034 - Thus in commenting on the in rem-extinguishment theory it is said in 1 Nichols on Eminent Domain (rev. 3d ed.) 39 (1964): "A distinction must be drawn between the divesting of the owner's title and the latter's claim to compensation...The determination of such claim... is dependent upon the interest of the party in the title at the moment that title vested in the condemnor."
- 1035 - As in *Gates v. De La Mare*, 142 N.Y. 307, 37 N.E. 121 (1894). Although in *Fall River Valley Irrig. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 259 P. 444, 451; 56 ALR 264 (1927) the court appears to take the position that the defendant which had condemned the riparian privileges and rights of two riparian owners who would be harmed by its operations need not be concerned about the possible claims of other riparian owners, and although its statement that the condemned riparian rights had been "obliterated" indicated that it was thinking in terms of the in rem-extinguishment theory, the court did not predicate nor need to predicate the strength of defendant's position against the other riparian owners on that theory; for the court had pointed out that all of them whose riparian land lay above the point at which the defendant was returning to the stream the water it was diverting for power purposes, except the two riparians whose rights had been condemned, had voluntarily sold their riparian land and interests to the defendant. It would seem therefore that the conclusion reached in *Fall River* as to the position of the condemnor as against the other riparians does not militate against the probability that even if a court adheres to the in rem-extinguishment theory, it would require the condemnor to pay not only for the riparian privileges and rights of the named condemnee, but also for those of any other riparian owners which were extinguished by the condemnation.
- 1036 - The possibility that, pursuant to the variability principle comprised in the riparian doctrine (as to which principle see pp. 16 & 223, ante), the extent of the condemnee's privilege might expand or contract because of a change in conditions after the governmental condemnor had acquired it do not preclude arrival at this conclusion. As the condemnee's privilege, while in his hands, was subject to expansion or contraction if changed conditions should require, the privilege which the governmental condemnor acquires from the condemnee is not greater or less than his merely because it is subject to the same possibility of change. As to the advisability of restricting to some extent the operation of the variability principle in order to achieve a reasonable reconciliation of the demands for certainty and flexibility see *Farnham, Improvement of New York Water Law*, 3 Land & Water L.R. 377, 410-411 (1968).
- 1037 - See the quotation from *United Paper Board Co. v. Iroquois Pulp & Paper Co.* at p. 243, ante.

- 1038 - *San Joaquin & Kings River Canal & Irrig. Co. v. Stevinson*, 164 Cal. 221, 128 P. 924 (1912).
- 1039 - As in *Village of Champlain v. McCrea*, 165 N.Y. 264, 59 N.E. 83 (1901), or as the privilege of infringing such rights as in *Matter of Gillespie*, 272 N.Y. 18, 3 N.E. (2d) 618 (1936).
- 1040 - The undesirable consequences of such an increase might prove to be widespread if, as predicted (Hamilton, *The War Against Hunger*, 44 N.Dak. L.R. 444 (1968)), the world food shortage intensifies. Although irrigation has not thus far proved to be the most profitable use of water (Anderson, *Emerging Nonirrigation Demands for Water*, 17 *Agricultural Economics Research* 116, 120 (1965); Trelease & Lee, *Transfer of Water Rights*, 1 *Land & Water L.R.* 1, 3 (1966)), the political and social importance of irrigation and even its economic importance might well be increased by continued expansion of the need for food.
- 1041 - For a recommendation that severance and transfer of riparian privileges and rights be authorized by statute see Cribbet, *Illinois Water Rights Law* 50-1 (1958). For a recommendation that a severability doctrine be developed under the riparian doctrine, which, in view of the state of the common law as to severability in many states, appears to be a recommendation that legislation be enacted to that end, see Harnsberger, *Eminent Domain & Water Law*, 48 *Neb. L.R.* 325, 370 (1969). A similar suggestion is made in Guerard, *The Riparian Rights Doctrine in South Carolina*, 21 *S. Car. L.R.* 757, 769 (1969). For a statute which appears to authorize the severance of riparian rights from riparian land see *Kan. Stat. Ann.*, sec. 82a-701. But in 1953 Florida enacted a statute providing that riparian rights "are appurtenant to and are inseparable from the riparian land". See *Fla. Stat.*, sec. 271.09(1) and comment upon it in Maloney, Plager & Baldwin, *Water Law & Administration - The Florida Experience* 96-7 (1968). And in 1958 Iowa enacted legislation which appears to prevent the transfer of water use permits apart from the land to which they are appurtenant even though that land may be non-riparian. See *Ia. Code*, secs. 455A.20 and 455A.30 and comment thereon in Hines, *A Decade of Experience Under the Iowa Water Permit System*, 8 *Nat.Res.J.* 23,36-7 (1968) and in Plager & Maloney, *Emerging Patterns for Regulation of Consumptive Use of Water*, 43 *Ind.L.J.* 383,397 (1968). For reasons previously stated, (see pp. 227-8 & 251, ante) the Florida and Iowa legislation would appear to be contrary to the public interest.
- 1042 - Although this section would do more than codify the existing common law (see the authorities cited in fn. 992, ante), it would seem advisable in this instance, as in others, to combine codification with clarification and revision in order that the statute may present a reasonably complete picture of the law in a certain area. See pp. 135-6, ante.
- 1043 - Since, as already pointed out, it is important that persons whose privileges of user would be established by the legislation relaxing the common law restrictions on non-riparian use and on use for the benefit of riparian land other than that to which the privileges were

originally incident should possess ancillary riparian rights enabling them to protect their exercise of such privileges (see fn. 936 & fn. 983, ante), it is likewise important that the legislation recommended at this point, which would expressly authorize the severance of riparian interests from riparian land by reservation or transfer, should make it clear that riparian rights as well as riparian privileges are so severable.

- 1044 - Whether or not this section would involve clarification or revision in addition to codification would depend on whether the New York courts decided that California law rather than Michigan law on the point was part of the New York common law, and on what interpretation they put on the California authorities if their conclusion was that its common law rather than Michigan's was part of the riparian doctrine prevailing in New York. For discussion of the California and Michigan authorities, see pp. 230-1, ante.
- 1045 - See chap. 7, ante.
- 1046 - Kinney on Irrigation, sec. 58 (1894); 2 Farnham, Law of Waters 1570 (1904); 3 Tiffany on Real Prop. (3d ed.), sec. 727 (1939); VI-A Amer. L. Prop. 160 (1954); Hutchins, California Law of Water Rights 197 (1956); Water Resources & the Law (chap. by Ziegler) 52 (1958); Mann, Ellis & Krausz, Water-Use Law in Illinois, 16 (1964); 1 Rogers & Nichols, Water for California 225 (1967); 5 Powell on Real Prop. 372 (1970); Jones v. Conn, 39 Or. 30, 64 P. 855, 8; rehear. den., 39 Or. 46, 65 P. 1068 (1901); Harvey Realty Co. v. Borough of Wallingford, 111 Conn. 352, 150 A. 60, 3 (1930); Peck v. Olsen Construction Co., 216 Ia. 519, 245 N.W. 131, 7 (1933); Stratbucker v. Junge, 153 Neb. 885, 46 N.W. (2d) 486 (1951); Young v. City of Asheville, 241 N.Car. 618, 86 S.E. (2d) 408 (1955); Hudson v. West, 47 Cal. (2d) 823, 306 P. (2d) 807, 809-810 (1957); Thompson v.ENZ, 379 Mich. 667, 154 N.W. (2d) 473 (1967); State v. Pa. Rr. Co., 228 A. (2d) 587, 594 (Del. Super. Ct., 1967).
- 1047 - Thus the court said in N.Y. Cent. & Hudson River Rr. Co. v. Aldridge, 135 N.Y. 83, 95; 32 N.E. 50, 17 LRA 516 (1892) that if the owner of a tract of land riparian to a river should convey to a grantee other than a railroad a part of that tract consisting of a narrow strip bordering the river, thereby preventing any of the rest of his tract from having contact with the water, the grantor might cease to be a riparian owner. See also United Paper Board Co. v. Iroquois Pulp & Paper Co., 226 N.Y. 38, 46; 123 N.E. 200 (1919) in which the court said: "Riparian rights are the various privileges in the navigable or unnavigable waters, which are incident, under the law of the state, to the ownership of the shore or bank. In such ownership they have their origin and, generally speaking, they are annexed exclusively to land which borders upon the waters...The rights involved in the instant dispute arose from the lateral contact of the lands of Thomson and Dix with the waters of the river..."

- 1048 - "...the few authorities on the...question of whether the citizens of a city all become riparians when a stream runs through a city, and touches city property, seem to indicate that the citizens are not riparians." - R.W. Johnson, *Riparian & Public Rights to Lakes & Streams*, 35 Wash. L.R. 580,610-611 fn. 141 (1960). "Land contiguous to a stream and within the limits of a municipality is entitled to riparian rights to the same extent as though it were outside the municipality. If the municipality owns such land, it has the same rights with respect to it any individual would have. But a city, simply because it lies upon a stream, has no right to take water from the stream for the use of its inhabitants who live on non-riparian land within the city." - Hutchins, *Irrigation Water Rights in California*, Circular 452 Revised, Calif. Agric. Exper. Station 15 (1967).
- 1049 - See p. 31 & fn. 131; p. 70 & fn. 316; p. 79. Also *Sparks Mfg. Co. v. Town of Newton*, 57 N.J. Eq. 367,392; 41 A. 385; rev'd. on other grounds, 60 N.J.Eq. 399,45 A. 596 (En. & App., 1899).
- 1050 - See *City of Canton v. Shock*, 66 Oh. St. 19,63 N.E. 600 (1902) & *Grogan v. City of Brownwood*, 214 S.W. 532 (Tex.Civ.App., 1919).
- 1051 - See Trelease, *Law, Water & People*, 18 Wyo.L.J. 3,4 (1963) for the statement that "The major feature of the modern doctrine of riparian rights is that under it the law gives equal rights to the use of water to the owners of land which borders upon a stream." See also authorities cited in Farnham, *The Permissible Extent of Riparian Land*, 7 Land & Water L.R. 31,3, fn. 7 (1972). Even where riparian interests are transferable to non-riparians, the transferee could not establish his privilege or right without showing that his transferor owned riparian land.
- 1052 - Because of the state's possession of a sovereign power over lakes and streams the beds of which it owns, which power it may exercise in furtherance of a public purpose without making compensation to riparian owners harmed by such exercise (as to this power see fn. 380, & pp. 178-184, ante), and because sec. 401 of the N.Y. Environmental Conservation Law can be interpreted as declaring that provision of a municipal water supply is a public purpose, the protection which private investors would derive from the enactment of the recommended legislation would not extend to such of their activities as require a water supply from or the use of lakes or streams the beds of which are publicly owned. It would, nevertheless, seem worthwhile to enact such legislation since there are many lakes and streams in the state the beds of which are privately owned. See fn. 927, ante.
- 1053 - As to the variability principle see p. 16 & 223, ante.
- 1054 - See pp. 88-9, ante.
- 1055 - See p. 79; fn. 491 & p. 108, ante.

1056 - See p. 70, ante.

1057 - See fn. 21, ante.

1058 - The recommendation made at this juncture that the definition of riparian land should not be so expanded as to give municipal water supply projects involving the service of land within a municipality which has no contact with the water the full benefit of the riparian doctrine principle of variability is consistent rather than inconsistent with the position which will be taken in regard to that principle hereinafter: viz., that while it should not be abandoned in view of its ability to further the public interest in maintaining flexibility in the pattern of water use, it should be modified sufficiently to enable reasonable protection to be given to private investments in water-based projects; for the suggestion made here, like that which will be offered later, is in conformity with the idea that the operation of the variability principle should be prevented in situations in which it would appear to be contrary to rather than in furtherance of the public interest.

CHAPTER 9

PRIVATE AESTHETIC INTERESTS IN NEW YORK'S LAKES AND STREAMS

Introduction

In a recent law review note entitled "Aesthetic Nuisance: An Emerging Cause of Action"¹ it was persuasively argued that private citizens should be able to prosecute an "aesthetic nuisance action" in which the plaintiff could obtain relief if he could show that the defendant had impaired to an unreasonable degree the beauty of the prospect within sight of the plaintiff's land, or had obstructed to an unreasonable extent the plaintiff's view of that prospect.² Expressed in terms of property law instead of in the language of the law of actions and of the law of torts, the suggestion is that individual landowners should have a privately enforceable right that the beauty of the prospect within sight of their land should not be unreasonably impaired and that their view of that beauty should not be unreasonably obstructed.

In this study consideration will be given to four questions:

(1) Whether sec. 15-0701 of the New York Environmental Conservation Law, which embodies without change in wording sec. 429-j of the New York Conservation Law enacted in 1966,³ should be construed as having already taken New York an appreciable distance toward the goal set in the note referred to above by impliedly creating in one large group of landowners - those with title to riparian land⁴ - a privately enforceable right which was not included in the riparian rights recognized in New York before the enactment of that section:⁵ viz., a right that the natural condition of the body of water with which their land is in contact shall not be so altered as to impair its beauty to an unreasonable extent?

(2) If it be assumed that this statute should be so interpreted, was it advisable for the New York Legislature to enact it?

(3) Whether it would be advisable for the New York Legislature so to amend and expand the scope of sec. 15-0701 of the Environmental

Conservation Law that in place of the limited riparian right to natural beauty which was impliedly created by the enactment of that section it will expressly establish not only in riparian owners, but also in owners of land so situated with respect to a body of water that a riparian prospect is visible therefrom, a privately enforceable right that the natural beauty of the lake or stream and of the riparian prospect shall not be impaired or the view thereof from their lands obstructed to an unreasonable extent by an alteration in the lake or stream or by any other act?

(4) Whether sec. 15-0701 of the Environmental Conservation Law, if construed as assumed in question (2), and the statute referred to in question (3), could withstand attack on constitutional grounds?

Rights to Beauty and View at Common Law

It is clear that if the New York courts should give an affirmative answer to the first of the above questions, and if the New York Legislature should enact a statute embodying the provisions referred to in the third question, significant changes would have been made in the New York law with respect to the possession by individual New York landowners of privately enforceable rights to beauty and view. It is true, of course, that some New York landowners have enjoyed rights of this sort because they had acquired them from their neighbors by grant or contract.⁶ It is also true that the interest of an owner of New York land abutting on a public highway or street has been held to include a privately enforceable right that beautiful shade trees growing within the boundaries of the highway or street should not be destroyed except in furtherance of a public highway or street purpose; and it has been decided that the abutter possesses such a right even when the underlying fee in the public way belongs to some governmental unit rather than to the abutting owner.⁷

And finally the relevance of sec. 843 of the New York Real Property Actions and Proceedings Law to the protection of beauty of prospect and of the view thereof should not be overlooked. Since this section reads as follows:

"Whenever the owner or lessees of land shall erect or shall have erected thereon any fence or structure in the nature of a fence which shall exceed ten feet in height, to exclude the owner or occupant of a structure on adjoining land from the enjoyment of light or air, the owner or occupant who shall thereby be deprived of light or air shall be entitled to maintain an action in the supreme court to have such fence or structure adjudged a private nuisance. If it shall be so adjudged its continued maintenance may be enjoined. This section shall not preclude the owner or lessee of land from improving the same by the erection of any structure thereon in good faith."

it is evident that despite its failure to make express reference to beauty or view, a landowner who is able to invoke it successfully against a malicious⁸ interference with his receipt of air and light, will secure incidentally some protection against impairment of the beauty within his prospect and obstruction of his view thereof from his premises.

But except in the several situations referred to in the two immediately preceding paragraphs, the rule regularly applied in New York, as in most other states, is that neither landowners in general, nor owners of riparian land or of non-riparian land with an outlook upon a natural body of water in particular, have at common law a right that the beauty of the prospect visible from their land shall not be impaired to an unreasonable extent,⁹ or that their view of that prospect shall not be obstructed to an unreasonable degree.¹⁰ Thus while in *People v. Rubenfeld* the court said:

"The organs of smell and hearing, assailed by sounds and odors too pungent to be borne, have been ever favored by the law..., more conspicuously, it seems, than sight, which perhaps is more inured to what is ugly or disfigured...One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic. The question need not be answered to decide the case at hand.",¹¹

its statements go no farther than to intimate that the eyes have in rare instances been given the protection frequently accorded to the ears and nose. Indeed the court does not actually say that offenses to the eyes should also be made unlawful; and by reference to statutes designed to enlarge protection for aesthetic sensibilities, implies that in the absence of legislation, a lovely prospect has no legal shield. And although in *Perlmutter v. Greene* the court declared that:

"Beauty may not be queen but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality or decency. It is, however, needless for the decision of the case to delimit her sphere of influence.",¹²

thereby affirming that beauty is entitled to common law protection to an undefined extent, the force of that affirmation is considerably diminished by the truthful intimation that such protection, when given, is usually an incidental result of a decision to protect some interest other than that in beauty.

Considerable support for such an interpretation of the opinions in *Rubinfeld* and *Perlmutter* is afforded by the tenor of subsequent New York judicial holdings and utterances with respect to the existence of common law rights to beauty and to the ability to see it. Thus in *Crance v. State of New York* the Appellate Division said: "We find no case that suggests that 'scenery' is included in riparian rights ", and added that *Perlmutter* would seem to point to the conclusion that loss of view is not compensable.¹³ In *Keinz v. State of New York* the Appellate Division referred to the denial in *Crance* of the existence of a riparian right to scenery with apparent approval and as a holding to that effect.¹⁴ In *Kennedy v. Moog, Inc.* the court said: "In enjoining nuisances, there shall not be merely a sentimental, esthetic or artistic complaint."¹⁵ Moreover, while in *Arnold's Inn v. Morgan* the basis of the Supreme Court's denial of relief for an alleged interference with a claimed riparian right to view is not clear, it is conceivable that the court's refusal of damages and an injunction was referable to its belief that the interest of a riparian owner did not include a right to view.¹⁶

And finally it should be noted that long before the opinions in *Rubinfeld* and *Perlmutter* were written, the General Term of the New York Supreme Court in *Ledyard v. Ten Eyck* reversed a judgment of the trial court enjoining the defendant, an owner of land riparian to Cazenovia Lake, from planting trees on his land which would cut off the plaintiff's view of the lake from his riparian land. While the court did not in terms deny the existence of a riparian right to view, it said that although the defendant's conduct may not have been neighborly, the court could not regulate such matters.¹⁷ Despite the fact that this one of the several holdings in *Ledyard* seems never to have been cited in later New York cases may detract somewhat from its weight as an authority, it nevertheless affords appreciable additional support for the position taken in *Crance* and *Keinz*.¹⁸

The many decisions by the courts of New York and of other states that when a part of a tract of land is taken by eminent domain, and the use of the part taken impairs the beauty of or obstructs the prospect from the part not taken, the former owner of the part taken is entitled to compensation for the impairment of beauty or obstruction of view if the market value of the part he still owns is thereby reduced,¹⁹ are not inconsistent with the statements previously made herein that in New York and most other jurisdictions the law is that a landowner, whether or not his land has contact with or affords a view of a lake or stream, possesses no common law right to beauty or view,²⁰ because the courts have not justified their awards of compensation for loss of beauty or view in the condemnation cases on the theory that a landowner has a right to beauty or view at common law for which compensation must be given if destroyed by eminent domain,²¹ but have instead taken the position that a condemnee, part of whose land is taken, is entitled to the difference between the market value of the land he owned before the condemnation proceeding and the market value of the part of such land which is left to him after the condemnation;²² and that he is entitled to such compensation even though the decrease in the market value of the untaken part is caused by the impairment of the beauty of the neighboring prospect or obstruction of the view of that prospect rather

than in some other way.²³ If it be argued that this application of the before and after principle of eminent domain is improper in this case because it gives the condemnee compensation for the loss of beauty or view to the continued existence of which he had no enforceable right, it can be pointed out in rejoinder that so long as the beauty of the prospect within view of the untaken part of the condemnee's land is unimpaired and its visibility from the untaken part is unobstructed, the condemnee can obtain a higher price for it than he could get if such impairment or obstruction had occurred, even from a purchaser who knew that he would acquire no right to beauty or view enforceable against his neighbors when he bought the untaken part, because the purchaser would usually feel that in view of the past behavior of the nearby owners, the actual probability was that the natural beauty of the neighborhood would continue unimpaired and visible from the land he was buying for many years. Compensation is not awarded to the condemnee in these cases on the theory that he had a common law right to beauty and view which had been destroyed by eminent domain, but rather because of the destruction of the landowner's reasonable expectation of the continuance of the existing beauty and view.²⁴ While expectancies are far from fully protected, analogical support for the California analysis and treatment of the question at hand is not entirely lacking.²⁵

In sum, the foregoing review of the cases as to the existence of rights to beauty and view at common law quite definitely establishes the truth of the statement previously made: viz., that if the New York courts should give an affirmative answer to the first of the questions to be discussed herein, and if the New York Legislature should enact a statute embodying the provisions referred to in the third of such questions, significant changes would be made in the New York law with respect to the possession by individual New York landowners of privately enforceable riparian rights to beauty and view.²⁶

Has a Limited Riparian Right to Beauty Been Impliedly Created By
Sec. 15-0701 of the New York Environmental Conservation Law?

Subd. (1) of this section provides in substance that no alteration in the natural flow, quantity, quality or condition of a natural watercourse or lake, however, effected, shall be actionable unless it is causing harm to the plaintiff. Subd. (5) provides in substance that such a harmful alteration in a body of water is unlawful if unreasonable. Subds. (2) and (3) provide in substance that such an alteration shall be deemed harmful if it interferes with the plaintiff's enjoyment of riparian land, regardless of whether such interference is causing him financial loss; that an interference with enjoyment of riparian land has occurred if the alteration renders it less suitable or useful for the purpose to which it is devoted; and that one way in which a decrease in such suitability or utility can be shown is by proof that the alteration has diminished the natural beauty of the watercourse or lake.

Should these subdivisions be construed as having created by implication a riparian right that the natural condition of a body of water should not be so altered as to impair its natural beauty to an unreasonable extent? It is submitted that this question should be answered in the affirmative for several reasons. In the first place, these three subdivisions, when read together, provide that while harmless alterations in the natural condition of bodies of water are lawful, harmful alterations are unlawful if unreasonable, and that any alteration can be shown to be harmful by proof that it will diminish the natural beauty of the watercourse or lake. In the second place, it would seem to be pointless to enact such provisions unless the aggrieved riparian owner could maintain an action when the natural beauty of the watercourse or lake on which his land abutted is unreasonably impaired. And finally, as he could not maintain such an action unless he could show that the harm he suffered because of the impairment of natural beauty constituted a violation of some right possessed by him,²⁷ it is necessary to take the position that the section, despite its failure to make express reference to a riparian right to beauty, creates such a right by implication, unless the section is to be deprived of all practical

significance.²⁸ As courts are naturally reluctant to interpret a statute in such a way as to render any part of it a virtual nullity when an alternative construction is available which will give it an important and apparently intended effect,²⁹ it follows that the New York courts should and probably will interpret sec. 15-0701 as impliedly creating a riparian right to natural beauty.³⁰

Assuming that in 1966 the New York Legislature Created in Owners of New York Riparian Land a Privately Enforceable Right that the Natural Beauty of the Lakes and Streams on which their Lands Abut should not be Impaired to an Unreasonable Extent by an Alteration of the Natural Condition of the Lake or Stream, was it Advisable for the Legislature to have Done so?

An affirmative answer to this question would appear to be correct. Since it seems likely that one of the most common and powerful inducements to the purchase or retention of riparian land previously acquired is the aesthetic enjoyment which the buyer or owner expects to obtain from the natural beauty of the lake or stream,³¹ it would seem desirable to enable him to ensure the continued existence of such beauty to a reasonable extent.³²

While it could be argued that recognition of a right to the preservation of natural beauty should be denied for the same reason which has been offered in defense of the rejection by the great weight of authority of a common law right to air and light: viz., because the existence of such a right would too seriously jeopardize the public interest in the development of land, which is often deemed to be best served by leaving each landowner free to erect on his own premises whatever structures appear to him best to further his own purposes,³³ it can be argued in rebuttal that in the light of the usual desires and expectations of the typical owner of riparian land with respect to enjoyment of the beauty of the adjacent water and prospect, the absence of a privately enforceable right to beauty would be relatively more of a hardship to him than the absence of a right to air and light would be to the owner of non-riparian land, or the lack of a right to beauty would be to the owner of premises

from which the charm of a lake or stream would not be visible.³⁴ Moreover, as so many owners of land riparian to a body of water had, as pointed out above, a view of natural beauty in mind when they acquired or decided to retain such land, a claim by any one of them to a riparian right to beauty would probably be considered fair and natural by most if not all of the others. The probability of the prevalence of such an attitude supplies at least a partial answer to the objection that one who buys or retains a riparian tract at a time when the law does not recognize the existence of a riparian right to beauty cannot complain if neither the courts nor the legislature create such a right later on. A further answer to such an objection is afforded by the fact that after the owners of land in a district have so developed it as to give it a residential character, it is often deemed advisable and just to enact a zoning ordinance barring all but residential structures from the district, even though when the owners of the several lots acquired them no restriction had been imposed upon their use either by private contract or by ordinance.

But was it advisable for the New York Legislature to go so far in its protection of the natural beauty of bodies of water as to provide in substance in sec. 15-0701 of the Environmental Conservation Law that an alteration in the natural condition of a watercourse or lake which diminishes its natural beauty, will be a harmful alteration, and therefore actionable if unreasonable, even though the diminution in natural beauty has not caused and will not cause the complaining riparian owner measurable financial loss?³⁵ The effect of the provisions of sec. 15-0701 would, of course, be to enable a riparian owner to obtain an injunction against the impairment of the natural beauty of a body of water if the trier of the facts should conclude that the impairment of beauty was unreasonable, even though the complaining riparian owner had not turned the lovely scenery to commercial advantage by establishing a recreational resort on his riparian tract, and had made no more use of the charming natural setting than to view it for his personal satisfaction;³⁶ and even though the market value of his riparian tract had not fallen because the acts which had impaired the natural beauty

of the prospect visible from it had at the same time increased the potential utility of the riparian tract for purposes other than recreational.

While it has been held in a few cases that a riparian owner is entitled to relief when his resort business has been harmed by an alteration in the natural condition of a lake which greatly impairs its natural beauty,³⁷ what little common law authority there is as to the ability of a riparian owner to obtain relief if he has been using the beauty of a body of water merely for his own personal satisfaction is divided. Thus in the leading case of *City of Los Angeles v. Aitken* the court, after giving a riparian owner relief for harm done to his commercial interest in the beauty of a lake, uttered a dictum clearly indicating its belief that the riparian plaintiff would not have been eligible for relief if the alteration complained of had interfered only with privileges of personal enjoyment.³⁸ On the other hand, in *Petroberg v. Zontelli*, the court said in substance that a riparian owner had a right to the enjoyment of the natural beauty and scenery of a lake either for profit or pleasure.³⁹ See also *Collens v. New Canaan Water Co.* in which the court, when enjoining the defendant's diversion of water for municipal supply, pointed out that the plaintiffs were owners of residential riparian land, who were using the river for swimming, boating and fishing, and that the diminution in the river's flow interfered not only with these activities, but in addition impaired the scenic advantages of their properties;⁴⁰ thus quite clearly recognizing the existence in the plaintiff riparian owners of a right that their personal enjoyment of the beauty of a river should not be unreasonably interfered with.

That it was advisable for the New York Legislature to embody in sec. 15-0701 the one of the common law views which is the more liberal in affording protection to riparian interests in beauty seems clear. A riparian owner whose hopes for the enjoyment of natural beauty have been frustrated to an unreasonable degree should not be denied relief merely because he cannot show financial loss resulting from reduction of the profits of a business enterprise or a decrease in the market value

of his riparian tract.⁴¹ The loss of an intangible, the value of which cannot be established with sufficient accuracy by legal evidence, may in many cases be as keenly felt by a riparian owner as would a loss of a certain and substantial number of dollars; and there is authority for the proposition that a defendant can be guilty of a nuisance and subjected to injunctive restraint, even though the plaintiff cannot prove that the defendant's act caused him financial loss, provided the plaintiff can show that the defendant's interference with his enjoyment of his land was substantial and unreasonable.⁴²

If, however, as has been suggested,⁴³ the creation in a riparian owner of a right to beauty is likely to result in the imposition of undesirably severe restrictions on the water-based activities of other persons, it was a mistake for the New York Legislature, by enacting sec. 15-0701, to have impliedly created a riparian right that the natural beauty of a watercourse or lake should not be impaired by alterations in it, even though frustration of aesthetic hopes would be a heavy blow to most riparian owners, and though the position that aesthetics should be protected only when commercially exploited is difficult to reconcile with the basic principles of the law of nuisance, and with the current attitude of an increasing number of people toward aesthetic values. It is submitted, however, that the enforcement of the right to beauty created by this section will not curtail the use of lake and stream water to such an extent as to conflict with the public interest in the optimum use of the water resources of the state.

If the New York courts could be expected to interpret sec. 15-0701 as having created in riparian owners an absolute and unconditional right that the natural beauty of the body of water to which their land is riparian should not be impaired to any extent whatever by alterations in its natural condition, the risk of such undesirable curtailment could be considerable. It seems quite unlikely, however, that this section will be so interpreted. While its second subdivision provides that an alteration in a body of water is classifiable as harmful if it diminishes its natural beauty, it does not expressly provide or even imply that harm is all that a riparian owner need show in order to succeed in a

suit against the party altering the watercourse or lake. Moreover, although the section does not state in so many words that no harmful alteration is actionable unless it is unreasonable, subds. (3) and (4) quite clearly imply that a showing of the unreasonableness of the defendant's conduct is in all cases prerequisite to the establishment of his liability.⁴⁴

Interpretation of sec. 15-0701 so as to make the right to beauty it impliedly creates enforceable only as against unreasonable impairments of natural beauty, would be consistent with the position taken by the New York courts in several cases that a stream alteration is lawful if reasonable, even though substantially harmful.⁴⁵ It would, moreover, be in conformity with the restrictions which the legal scholars have in recent writings indicated should be imposed on the scope of such rights.⁴⁶ A contrary interpretation of the section: viz., that it enables a riparian owner to maintain an action merely by showing impairment of the natural beauty within his prospect or obstruction of his view of that beauty without requiring that he also show the unreasonableness of the impairment or obstruction, would be tantamount to looking upon the section as a partial codification of the natural flow version of the riparian doctrine; a version under which harmful alteration in the natural condition of a body of water would necessarily be wrongful, because under it even a harmless alteration would be actionable if substantial.⁴⁷ But an assumption that the legislature intended to codify the natural flow version of the riparian doctrine, even to the limited extent necessary to give a special advantage to claimants of the riparian right to beauty, would appear to be of doubtful validity for two reasons. First, the natural flow version has often been criticized because it requires the maintenance of the natural condition of a body of water without regard to the possible desirability of permitting reasonable alterations in its natural state.⁴⁸ Second, such an assumption involves the conclusion that although the legislature had in subd. (1) of sec. 15-0701 codified one of the most important rules embodied in the reasonable use version of the riparian doctrine: viz., that no alteration in the natural condition of a body of water is unlawful as long as it causes no harm,⁴⁹

the legislature intended at the same time, and in favor of the right to beauty impliedly created by Subd. (2), to codify one of the rules comprised in the natural flow version.⁵⁰ Granting that a riparian owner who looks at a stream or lake in order to enjoy its natural beauty should be held to be making a use of the water,⁵¹ there would not seem to be the slightest justification for making the riparian right to beauty an absolute right, thereby giving aesthetic interests in water much more protection than is accorded other equally important and legitimate interests in lakes and streams, and enabling the claimant of the right to beauty to block reasonable uses of water by others merely because they cause him harm, when plaintiff riparians who have been using water for irrigation, industry or power production have no such ability.⁵²

If, as just predicted, sec. 15-0701 be interpreted as providing that the riparian right to beauty which it has created is enforceable only against unreasonable impairments of natural beauty, there need be little fear that the enforcement of the right will hamper the uses of lakes and streams in furtherance of economic and other important interests to an undesirable extent, and so endanger the public welfare.⁵³ It will be remembered that when passing on the issue of reasonableness the trier of the fact must take all circumstances into account,⁵⁴ including the relative suitability to the body of water of the respective claims and activities of plaintiff and defendant;⁵⁵ whether the harm which plaintiff would suffer if defendant's activity were held lawful would be less than that which the defendant would sustain if his activity were held unlawful;⁵⁶ whether it would be practicable for either party to do anything to reduce the amount of harm which the defendant's activity was causing the plaintiff;⁵⁷ and according to the weight of authority, and probably under New York law, the relative importance to the public of the defendant's activity and of the satisfaction of the plaintiff's desires.⁵⁸

Thus if a case arose in which it appeared that an industrial user of a stream had altered its natural condition by discharging colored liquids into it and by reducing its flow, but in which it was also shown

that he could not operate his plant profitably if required to cease discoloration of the water and reduction of flow; that the beauty of the plaintiff's prospect had already been substantially impaired by the activities of users of the stream other than the defendant without objection by the plaintiff; that the impairment of beauty caused by defendant's activity would, therefore, have little effect on the market value of plaintiff's riparian tract; that the employment by defendant of 100 people resident in the area was of great economic importance locally; that there was a steady demand for defendant's product, and that a shift in the plant's location was not practicable, the defendant's impairment of the beauty of the plaintiff's prospect would almost surely be held to be reasonable and therefore lawful; a conclusion which would probably be viewed as correct by a large majority of people not personally involved in the case. Indeed, it is entirely conceivable that the defendant might be successful even though he established only several rather than each of the points which it was assumed that he had proved in the case just put. Thus if he could show that the prospect in view from plaintiff's riparian land included little scenic beauty, either because nature had not been generous with her blessings in the plaintiff's neighborhood or because other persons had substantially diminished its original beauty before the defendant's activity began, the rule that in passing on the reasonableness of a defendant's harmful activity account should be taken of the harmful activities of others in the vicinity,⁵⁹ and the rule stated in *Obrecht v. National Gypsum Co.* that "the locality and surroundings of the challenged operation or thing become an important factor in arriving at proper judicial decision of existence or non-existence of a nuisance"⁶⁰ would in combination probably lead to a judgment for the defendant.

In answer to the argument that recognition of a right to beauty in riparian owners "could place an intolerable financial burden on public water supply projects,"⁶¹ it can be pointed out that our courts and legislatures have all along recognized or created property rights to satisfy what they deemed to be the reasonable desires and expectations of the people, despite the probability that many of them would become so

valuable that they would in the future substantially increase the cost to the government of carrying out necessary public projects which would involve infringement of such rights; and it can be urged that unless and until the people decide to abolish the institution of private property altogether, a legislature should not refuse to create an otherwise desirable new property right primarily because it might become valuable and expensive to extinguish for a public purpose.

If it be suggested that in view of the courts' probable reluctance to restrict agricultural, industrial and other valuable uses in order to protect a right to beauty unless it has been commercially exploited, such a right would have little practical significance and be not worth creating because so few of its possessors would ever be able to secure protection for it,⁶² it can be replied that while it cannot be denied that in many cases the economically important use would prevail over the right to beauty, it is not unreasonable to assume that an opposite result would be arrived at in an appreciable number of instances. For example, if it again be supposed that a defendant who is using a stream for industrial purposes is impairing its natural beauty by discoloring it and reducing its flow, but if it also be assumed in this instance that the defendant could, without unreasonably reducing his profits, so alter his methods of operation that he would be able to return most of the water to the stream and without discoloration, the plaintiff would have established that the defendant's present mode of operation was unreasonable because it involved the defendant's infliction of practicably avoidable harm, and therefore constituted a violation of the plaintiff's right that the natural beauty of his prospect should not be unreasonably interfered with.⁶³ While the defendant might claim that an unfair burden had been imposed on him by such a decision and so raise the objection discussed in the preceding paragraph, it is doubtful that neutral parties would conclude that the burden created was so heavy as to be contrary to the public interest in the prosperity of industry, or that such a complaint would be upheld by the courts if made. After all, the public has an interest not only in the continuance of industry, but in the manner of its operations.⁶⁴

And even in a competition with water needs for municipal supply a plaintiff riparian owner need not feel that his position would be hopeless, because, as already stated, it is the law on one ground or another in most states,⁶⁵ including New York,⁶⁶ that unless the lake or stream involved is one over which the state has sovereign power,⁶⁷ private riparian rights in it cannot be destroyed without compensation by a governmental unit, despite the obviously great importance of the municipality's need for water.⁶⁸ It will be remembered that in *Collens v. New Canaan Water Co.*,⁶⁹ as previously pointed out, the court appeared to have held that a riparian owner has a common law right with respect to the natural beauty of a watercourse, and that this right, like other riparian rights, is enforceable against a defendant diverting water for municipal supply.⁷⁰ Reconciliation of this conclusion with the position that the relative public importance of the litigants' respective activities must be taken into account when passing on the issue of reasonableness is not difficult. As hereinbefore stated, some authorities hold that municipal supply is a non-riparian use, which if harmful, is unreasonable and wrongful as a matter of law.⁷¹ Other courts have held that a use for municipal supply, though riparian, is unreasonable;⁷² a position which can be supported on the ground that when water is withdrawn from a lake or stream for public use, it is more reasonable and equitable that the many who will receive the benefit of the water should pay their relatively small proportion of the cost than that a few riparian owners should be deprived without compensation of their riparian rights,⁷³ the value of which would normally have been reflected in the purchase price of their riparian tracts, and the loss of which would in many instances inflict a heavier financial blow on their owner than one man should have to bear because of the execution of a public project. This position, is, moreover, consistent with the well established view that when private property rights are taken for a public use rather than to effectuate a more equitable adjustment of interests as between neighboring landowners, the police power cannot be relied upon to justify a denial of compensation for the taking.⁷⁴

If it be suggested that a plaintiff seeking enforcement of his riparian right to beauty could rarely demonstrate that it would be in the public interest to vindicate such a right because riparian owners, while numerous, constitute only a relatively small minority group, and because the public interest normally rides with the well being of the majority, it can be replied that the continued legal viability of zoning⁷⁵ testifies to the wide acceptance of the view that a statute is not necessarily contrary to the public interest simply because its primary effect is to benefit only a small fraction of the public rather than most of the people of the state.⁷⁶ In other words, if it is consistent with public policy to enact and enforce legislation enabling groups of people living in cities or even in towns and villages to effectuate their desires with respect to the density of population and the location and use of structures for trade, industry, residence or other purposes,⁷⁷ it would also seem to be consistent with public policy to enact and enforce legislation enabling the thousands of owners of riparian land in New York to protect their aesthetic interests to a reasonable extent.⁷⁸ Even though the zoning power of municipalities has recently been curtailed by the authority given to the New York State Urban Development Corporation so as to provide for more consideration of regional and state interests than was formerly required, and has gone so far in this direction as to make it more difficult for the proponent of a statutory private riparian right to beauty to rely for support on the analogy afforded for many years by New York zoning law and practice,⁷⁹ he need not abandon his proposal; for there are several regions in the state of such considerable size and in which so many owners of riparian land are located,⁸⁰ and riparian owners are so widely distributed throughout the state, that the riparian interest could reasonably be looked upon as a regional or even as a statewide interest.

Could a plaintiff who alleged a violation of the private right to beauty created by sec. 15-0701 of the Environmental Conservation Law be defeated by proof that he was but one of many landowners who had sustained harm of the same kind as a result of the defendant's impairment of the natural beauty of a body of water? A negative answer to

this question would seem to be justified. Inasmuch as a violation of this right to beauty would involve interference with the enjoyment of privately owned land, and as such a violation would therefore constitute a private common law nuisance,⁸¹ it could reasonably be expected that in an action for a violation of the right, the New York courts would apply the common law rules as to when the plaintiff's showing of harm of a kind different from that suffered by others is prerequisite to his recovery in a nuisance action. As to this the common law appears to be well settled. While it is true that if the defendant's conduct has not violated any private property right of the plaintiff's, and so has created a public nuisance only, a private plaintiff cannot succeed in an action founded on the public nuisance, even though he has been substantially harmed thereby, unless he can show harm different in kind from that suffered by the general public,⁸² there appears to be no dissent from the view expressed in several states that if many landowners have been harmed by a nuisance involving a violation of their private property rights, each one of them can recover against the defendant, even though not one of them can show that the harm he suffered differed in kind from that sustained by the others.⁸³ This is true although the defendant's conduct constitutes a public as well as a private nuisance, provided the suit is based on the private nuisance.⁸⁴ The validity of this position seems clear. A defendant who has violated private property rights should not be able to escape liability by showing that he had inflicted the same kind of harm on many rather than on one or two.⁸⁵ And so it is more than likely that a plaintiff seeking vindication of his private statutory right to beauty could succeed even though the defendant's impairment of beauty had caused many others the same kind of harm it had inflicted on the plaintiff.⁸⁶

It should be borne in mind, however, that when a riparian owner seeks protection for his riparian privileges and rights against a defendant which has the power of eminent domain and which has obtained a permit from a state administrative agency to use a stream for municipal supply or to erect a dam upon it, or has been authorized by state statute to use a stream for disposal of municipal sewage, the riparian

owner cannot obtain injunctive relief if the defendant pays him the value of the riparian interests which it is taking.⁸⁷ A claimant of protection for a statutory riparian right to beauty could not reasonably expect to stand in a better position. It should also be remembered that the doctrine of balancing hardships or interests⁸⁸ has frequently been successfully invoked by defendants who, although they had neither the power of eminent domain nor governmental authorization of their harmful acts, were able to show that the public interest in the continuance of their operations justified the denial of injunctive relief to the plaintiff and his relegation to a claim for damages.⁸⁹ A riparian owner seeking protection of a statutory riparian right to beauty in this type of case would in all probability receive similar treatment.

Although the vulnerability of the riparian right to beauty created by sec. 15-0701 of the Environmental Conservation Law to eminent domain, to governmental grants of authority, and to the doctrine of balancing hardships has been offered as a basis for the suggestion that such interests are of little value to a riparian owner anxious to protect his riparian environment,⁹⁰ the validity of this contention seems doubtful. In the first place, its unqualified acceptance would be a step toward the extreme position that the creation of any new private property interest can be no more than an exercise in futility because its continued existence would always be subject to the paramount public right upon payment of just compensation. In the second place, the riparian right to beauty created by sec. 15-0701⁹¹ affords a defendant a financial inducement to minimize to the greatest possible extent his impairment of the right when executing his project. Thirdly, the section affords the riparian owner a basis for injunctive relief against defendants who have neither the power of eminent domain nor governmental authorization, and who are unable to take advantage of the doctrine of balancing hardships because continuance of their operation is not of sufficient importance to the public.⁹² And finally, the damages recoverable by a riparian owner from a defendant who for one reason or another is able to escape injunctive restraint would in many cases make up for the reduced sale price of the depreciated tract by enabling the riparian owner to replace it with another equally desirable.

But if sec. 15-0701 be interpreted as creating a right that the natural beauty of a lake or stream shall not be impaired to an unreasonable extent,⁹³ will juries and courts be confronted in too many cases with unduly difficult questions as to whether the defendant's acts have actually resulted in an impairment of natural beauty, or as to whether such impairment of beauty as he did cause was under all the circumstances unreasonable? If either of these queries must be answered in the affirmative, it could be argued with considerable force that it would not be advisable to interpret the section as creating a riparian right to beauty. Analogical support for an affirmative answer to the first of these questions is afforded by one of the reasons frequently given by the courts for their reluctance to recognize a right to beauty in landowners in general: viz., that what is unsightly in the eyes of A might be looked upon by B, C or D as entirely tolerable, or even as beautiful.⁹⁴ It has indeed been alleged that the trier of the fact would, if such a right were recognized, face an impossible task as arbiter in a field where there are "infinite variations of taste and preference."⁹⁵

It is submitted, however, that a negative answer to the first of the queries under consideration would be justifiable, even if it be conceded for the sake of argument that the difficulty of the question as to whether beauty has been impaired is not sufficiently decreased by the freedom of the trier of the fact to resort to the taste of the normal, reasonable man as to the criterion of unsightliness.⁹⁶ In this connection it should be borne in mind that the right to beauty under consideration is not one which has been created in every landowner, but only in proprietors of riparian land; and that while it may be very difficult to decide whether a structure erected on B's non-riparian city or village lot is so unsightly as to impair the beauty of A's prospect from his adjoining parcel, even if the standard applied is that of a normal reasonable man, it should be relatively easy in most cases to decide whether an alteration in a body of water has impaired its natural beauty; for "nature has already established the appropriate standards" which the great majority of people would usually find

acceptable.⁹⁷ Support for this view is afforded by cases in regard to the validity of covenants purporting to create rights to beauty by contract in which the courts have recognized the feasibility of enforcing a right to beauty when the physical situation supplies a standard by which beauty can be measured. See, for example, *Jones v. Northwest Real Estate Company*⁹⁸ in which the court, when faced with the question as to the validity of a covenant by the grantee of land that he would erect no structure on it until his plans had been approved by the grantor, who was to have the right to refuse approval of the plans if they did not in his opinion appear to be suitable for aesthetic or other reasons, and who, when passing on the plans, was to have the right to take into consideration the harmony of the proposed structure with the surroundings, upheld the grantor's power to prevent construction which was out of harmony with the pattern created by buildings already erected, but withheld approval of the provision which attempted to empower the grantor to refuse approval of plans for aesthetic reasons because of the difficulty of establishing any standard by which aesthetic values could be determined.

Of course, even if it is found in a particular case that the defendant has in fact impaired the beauty of the plaintiff's prospect, the task of the trier of fact will not have been finished until it has been decided whether or not the impairment was unreasonable, since, as already indicated, the statutory right to beauty should and probably will be interpreted as protecting the riparian owner only from acts of the defendant which are unreasonable.⁹⁹ While in some cases it will be easy to decide whether or not the defendant acted reasonably in impairing the beauty of the plaintiff's prospect, as when it would have been practicable for the defendant to have accomplished his purpose without causing such harm,¹⁰⁰ in other cases it may be much more difficult to arrive at a conclusion, as when the defendant can show that execution of his project depends on an alteration in a body of water which is destructive of its natural beauty; that the financial feasibility of his project is conditioned on his freedom from liability for such destruction; that the economic interest of the public would

be furthered if the defendant were not required to transfer his operation to another site, and that the plaintiff's riparian tract would have more value for manufacturing than for recreational use, while the plaintiff riparian can show that the body of water involved, because of its beauty and other desirable characteristics, was eminently suitable for recreational activities; had been used for such purposes for many years prior to the defendant's arrival on the scene; and that no other riparian land nearly as suitable for recreational use by a large number of private owners was available within a reasonable distance.

But difficult as a decision of the reasonableness issue in such a case would be, the difficulty would be no more insuperable than that involved in deciding many other questions which courts have long been called upon to face.¹⁰¹ Moreover, it should be just as feasible to come to a conclusion as to the reasonableness of acts destructive of natural beauty as it is to determine the reasonableness of acts alleged to be in violation of riparian interests in other aspects of lakes and streams. The truth is that when the facts are such that the court cannot render a decision without inflicting substantial loss on one party or the other, and neither party can practicably do anything to minimize the loss, the case will be difficult to decide and the soundness of the decision will be debateable regardless of whether the riparian right involved is a right to beauty or some other riparian interest. As justifying this assertion see *Bullard v. Saratoga Victory Mfg. Co.*¹⁰² which involved the plaintiff's right that his privilege of using stream water for power production should not be unreasonably interfered with, and in which it was held that as the downstream owner he must bear all the loss caused by defendant's interruption of the stream's flow in dry season, although it could be argued that the court should have required the defendant so to adjust his operations that the inconvenience and loss caused by low water would be borne equally by the parties in accord with the principle of sharing which has not infrequently been adhered to by courts applying the riparian doctrine.¹⁰³ See also *Petraborg v. Zontelli*¹⁰⁴ in which the defendant was enjoined from draining half of a lake in furtherance of its mining operations, because

such drainage would seriously interfere with the plaintiff's enjoyment of the lake for recreational purposes, unless the defendant should extinguish the plaintiff's recreational rights by eminent domain, although it could be argued that in view of the great economic importance to the state of the defendant's project its interference with the plaintiff's recreational activities to the extent indicated was reasonable. Also pertinent here is *Harris v. Brooks*¹⁰⁵ in which the defendant was enjoined from lowering the level of a lake by withdrawal of water for rice irrigation because such withdrawal would unreasonably interfere with the plaintiff's enjoyment of his riparian privilege of using the lake for the operation of a boat livery patronized by fishermen, although it could be contended, as it could have been with regard to *Bullard*, that the parties should have been directed to share the inconvenience and loss resulting from prolonged drought.¹⁰⁶ It would seem to follow that if except for the difficulty of resolving the issue as to reasonableness, it would be clearly advisable, as seems to be the case,¹⁰⁷ for riparians to have a privately enforceable right to beauty, that difficulty should not be allowed to stand in the way of the creation of such a right any more than in the way of the recognition of other valuable riparian rights. Acceptance of the difficult task of passing upon the reasonableness of harmful alterations in bodies of water or in their uses is part of the price which must be paid along with toleration of the principle of variability¹⁰⁸ for the important advantages incident to adherence to the reasonable use rather than to the natural flow version of the riparian doctrine:¹⁰⁹ viz., avoidance of waste of water,¹¹⁰ and maintenance of flexibility in the pattern of water use in order to permit its adjustment to meet new conditions.¹¹¹

Possible Amendments to Sec. 15-0701 of the New York
Environmental Conservation Law

Would it be Advisable so to Amend sec. 15-0701 that in Place of the Limited Riparian Right to Beauty Created by that Section it will Establish not only in Riparian Owners, but also in Owners of Land which, although Non-riparian, Commands a View of a Natural Body of Water, a Right that the Natural Beauty of the Body of Water and of its Setting shall not be Impaired or the View thereof from their Lands Obstructed to an Unreasonable Extent by an Alteration in the Body of Water or by any other Act?

Assuming that for the reasons already stated it was advisable for the New York Legislature to enact sec. 15-0701 creating a right enforceable by private riparian owners that the natural condition of the body of water to which their lands are riparian shall not be so altered as to impair its natural beauty to an unreasonable extent, there would seem to be no persuasive reason why the Legislature should not enact an amendment expanding that right so as

- (1) to give a riparian owner a cause of action for impairment of beauty not only when the beauty of the lake or stream visible from his riparian land is unreasonably¹¹² impaired, but also when the beauty of any part of the prospect, whether of land or of water, which is visible from his riparian holding, is unreasonably diminished;
- (2) to give a riparian owner such a cause of action regardless of whether the unreasonable impairment of beauty is brought about by an alteration of the body of water, or by some other act such as the destruction of trees and bushes or the erection of an unsightly structure on its banks;
- (3) to make such a cause of action available not only to riparian owners, but also to anyone owning premises commanding a view of a natural body of water; and

(4) to give to owners of land riparian to or commanding a view of a natural body of water a cause of action if by any act whatever the view from their lands of such body of water or of its natural setting is unreasonably obstructed.

It would, moreover, appear that there are cogent reasons for expanding, in the four respects just indicated, the limited statutory right to beauty now existing in New York.

In support of the first of these proposed expansions it can be said that satisfactory protection cannot be given to the strong desire usually entertained by one who acquires or retains land bordering on or commanding a view of a lake or stream to enjoy the natural beauty of that view¹¹³ unless he is able to protect to a reasonable extent the beauty of the terrain surrounding the lake or stream as well as the beauty of the body of water itself.

Considerations justifying the second expansion of sec. 15-0701 suggested above are not lacking. If, as just pointed out, it would be desirable to give the owner of land abutting on or having a view of a lake or stream reasonable protection of the beauty of its setting as well as of the water, it would seem clearly inadvisable to restrict his ability to secure relief to cases in which the impairment of the beauty of his prospect is caused by an alteration of the lake or stream itself, as the section seems to provide at present - at least if strictly construed. It would appear preferable to protect him against unreasonable impairment of the beauty of his prospect caused by acts done on the land in which the lake lies or through which the stream flows, even though such acts did not result in any alteration whatever of the body of water itself.

That owners of land from which a lake or stream is visible, but which is not in contact with the water and is therefore non-riparian, should, pursuant to the third suggested expansion of sec. 15-0701, be given the same right to the protection of natural beauty which it has been suggested above should be accorded to a riparian owner may at first glance appear to be a rather radical proposal which might entail undesirable consequences. It is submitted, however, that upon reflection

this charge will be found unsustainable. For one thing, the desire of an owner of land which, although non-riparian, commands a view of a natural body of water and of its surrounding terrain, for the enjoyment of the beauty of such view, is undoubtedly in most cases as strong and worthy of protection as the desire of a riparian owner for such enjoyment; and if, as previously suggested, it is proper to give a riparian owner reasonable protection for the beauty of his riparian prospect because of his thirst for the enjoyment of natural beauty,¹¹⁴ it would be equally proper to extend the same protection to a non-riparian owner possessing the same desire. While the fact that actual contact with the water does not appear to be of importance to one who chooses to acquire or to retain non-riparian land may testify to his indifference to boating, fishing and swimming, it obviously does not warrant the conclusion that his interest in natural beauty is too slight to be worthy of protection.

Furthermore, when passing on the question as to whether a particular act of a defendant has in fact impaired the natural beauty within the view of a non-riparian plaintiff, a court or jury will be just as much aided by nature's provision of an acceptable standard of reference as it would be in a case in which the plaintiff was a riparian owner.¹¹⁵ Moreover, while the question as to whether an impairment of beauty which had been found to have actually occurred is unreasonable and therefore in violation of a non-riparian plaintiff's right will often be difficult,¹¹⁶ it should be no more so than when the plaintiff's land is in contact with the water.

But would the adoption of the suggestion to confer a right to beauty and view on all persons whose land afforded a view of a body of water, regardless of whether that land was riparian, be likely in certain topographical situations to result in the imposition of too heavy a restrictive burden on the activities of those riparians who wished to use a lake or stream for important bread and butter purposes such as irrigation, industry or electric power production? For example, suppose a river runs through a valley five miles in width and walled in by mountains the slope of which toward the valley was gentle and long. Under

these facts the number of owners of land commanding a view of the stream might be so large that if it were held that the structures proposed by the defendant riparians for purposes of the sort referred to would impair the beauty of the stream and environs to an unreasonable extent and would therefore violate the right to beauty of the hillside owners, the plans to use the stream for irrigation, industry, power or whatever would probably have to be abandoned, because regardless of whether those wishing to use the stream for such purposes had or lacked the power of eminent domain, the cost of buying up the rights to beauty of all the hillside owners would be prohibitive. It should be borne in mind, however, that if a court were faced with the case supposed, it might well come up with a finding that while the beauty of the view which all of the hillside landowners presently enjoyed would indeed be impaired by the structures proposed, as to the landowners more than a certain distance from the stream the impairment was reasonable and therefore lawful; and this on the ground that the view of the stream and its setting from their premises was not sufficiently clear and visible often enough to afford significant aesthetic enjoyment.^{116a} Analogical support for such a finding is supplied by the courts which, when confronted with the question as to how much of a large tract of land having contact with a natural body of water can qualify as riparian, have held that only so much of it may be so classified as is situated within a reasonable distance from the water.¹¹⁷ Such a finding would, of course, greatly reduce the number of rights to beauty and view standing in the way of the proposed uses of the water and would make it feasible for the agribusiness irrigator, the industrialist or the power company to buy them up.

And it should not be overlooked that if to the facts of the case thus far assumed there were added those of one previously hypothesized,¹¹⁸ the court would be quite apt to decide that the impairment of beauty which would result from the erection of the structures proposed would be reasonable and lawful as to all of the landowners from whose premises the stream could be viewed regardless of whether they were near to it or distant from it. In short, the

doctrine of reasonableness could be counted upon in this type of case as in others to prevent any clearly unjust or unsatisfactory result in most instances.

When considering the advisability of accepting the suggestion that sec. 15-0701 be amended so as to provide for owners of land riparian to or commanding a view of a lake or stream a right that the view of the natural beauty thereof shall not be obstructed to an unreasonable extent, it should be borne in mind that precedent for the recognition of such a right to view - at least in riparian owners - has existed under Florida common law for a number of years;¹¹⁹ and that there appears to be no demand for the abolition of that right.

It should also be noted that when the Florida court first decided to recognize the riparian right to view at common law, it offered as justification for its decision the fact that has been relied on herein as the principal basis for the creation of a statutory riparian right to beauty;¹²⁰ viz., that persons who acquire riparian land are usually motivated by a strong desire for the aesthetic satisfaction obtainable by looking at a beautiful body of water.¹²¹ And so, since one who acquires or elects to retain land which, although non-riparian, commands a view of a lake or stream, would normally entertain the same strong desire for the same aesthetic satisfaction,¹²² there would be as valid a reason for extending the right to view to him as for giving it to a riparian owner.

It would, moreover, seem indubitably clear that if, as contended above, legislation creating a right to natural beauty in owners of land riparian to or commanding a view of natural bodies of water should be enacted,¹²³ there should also be created by statute a right that such owners' view of such beauty should not be obstructed; for in the absence of this right to view, the right to beauty would be deprived of all practical significance whenever anyone chose to cut off the view of the body of water and its environs by the erection of an obstruction.

And finally, a review of such of the considerations advanced in support of the recommended right to beauty as have not been referred to in the three immediately preceding paragraphs will reveal that they can

be adduced in favor of the suggested right to view with equally good effect.¹²⁴ Indeed, the right to view would have one definite advantage over the right to beauty, because in one respect the courts would find it easier to deal with. While the question as to whether a defendant has actually impaired the natural beauty of the body of water involved or of its setting might in some cases be a difficult one,¹²⁵ the question as to whether the defendant had actually obstructed the plaintiff's view of that beauty should normally be easy to answer.

Has the Recent Federal and New York Legislation Increasing the Protection Accorded to the Public Interest in Natural Beauty Eliminated the Need for the Possession of Privately Enforceable Rights to Beauty and View by Owners of Land Riparian to or Commanding a View of Natural Bodies of Water?

Typical of the recent environmental legislation¹²⁶ designed to protect aesthetic, cultural and recreational values are the federal and New York wild river acts, each of which clearly shows by expression of concern for the "benefit and enjoyment of present and future generations" that its primary purpose is the preservation of those values for the benefit and enjoyment of the public; and neither of which contains any provision conceivably interpretable as an indication of an intent to create a privately enforceable right to beauty and view in owners of land riparian to or commanding a view of a lake or stream.¹²⁷ In this regard they differ markedly from the federal Clean Air Act of 1970¹²⁸ and the Michigan Environmental Protection Act¹²⁹ of the same year which by respectively providing inter alia that

"...any person may commence a civil action on his own behalf -
(1) against any person...who is alleged to be in violation of
(A) an emission standard or limitation under this chapter or
(B) an order issued by the Administrator of a State with
respect to such a standard or limitation..."

"...any person...may maintain an action...against...any person...
for the protection of the...water and other natural resources...
from...impairment or destruction."

show with reasonable clarity an intent to allow any citizen to bring an action to protect the public interest in the quality of the environment, and could perhaps, and at least more easily than the federal and New York wild river acts, even be construed as creating rights enabling an owner of private property to sue to protect his interest as such an owner in the preservation of natural resources.^{129a}

But even if the federal and New York wild river acts contained provisions substantially similar to those quoted above there would still be room for doubt as to whether an owner of land riparian to or commanding a view of a body of water would be able to persuade a court that he not only was empowered by the act to sue on behalf of the public for violations, but that he had also been endowed by it with private property rights which he could enforce for his personal benefit. Doubt on this score may have been entertained by the attorneys for a Michigan riparian plaintiff who included in his complaint a count alleging a violation of his common law riparian rights in addition to a count alleging a violation of the Michigan Environmental Protection Act.¹³⁰

While it is true that statutes which, like the federal and New York wild river acts, do not in terms designate any beneficiary of their provisions other than the public, can be¹³¹ and have been construed in some instances as creating rights in private individuals when the court found that the subject matter of the statute, its general background and legislative history, singly or in conjunction, afforded a basis for holding, even if the wording of the statute apart from such factors did not, that it was the legislature's purpose to give rights and causes of action for the personal benefit of private persons who would be harmed by violations of the statute,¹³² a contrary construction can be¹³³ and has been put upon statutes of this kind when the court concluded that there was insufficient ground for finding that such a legislative purpose had been shown,¹³⁴ even though the statute did not in terms declare that the rights it created were for public benefit only.¹³⁵ But as a legislative intent to protect private as well as public aesthetic interests is no more indicated by

the subject matter, general background and legislative history of the federal and New York wild river acts¹³⁶ than it is by their wording, it is highly unlikely, and only barely conceivable, that these statutes would be construed as having created a privately enforceable right to beauty and view in owners of land riparian to or commanding a view of a natural body of water.¹³⁷ If for the reasons previously stated it is desirable that the owners of such land should have such a right, it should be unmistakably established by a statute which leaves no doubt that it was enacted to create them, instead of leaving the extent of the protection it affords to private landowners speculative and uncertain, as do the federal and New York wild river acts.

Suppose, however, that A, an owner of land riparian to or commanding a view of a river to which the federal or New York wild river act is applicable, could show that B was planning a project the execution of which would constitute a violation of one of these statutes or of regulations issued under it, and that such violation would impair the beauty of A's prospect or would obstruct his view of it, could A, even though he as such owner possessed neither a common law nor statutory right to beauty or view, obtain an injunction restraining B from violating the public right to beauty and view of wild rivers created by these statutes? The following quotation from the prevailing opinion in *Sierra Club v. Morton* affords strong support for an affirmative answer to this question.

"...palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review. Thus, neither Data Processing nor Barlow addressed itself to the question...as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared. That question is presented in this case. The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and by the attendant change in the aesthetics and ecology of the area...We do not question that this type

of harm may amount to an injury in fact sufficient to lay the basis for standing under sec. 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."¹³⁸

But while an ability to enforce the public right might afford a satisfactory remedy to A in any instance in which B's proposed project would involve a violation of one of the wild river acts, cases could conceivably arise in which the execution of B's plan, while harmful to A, would not amount to an infringement of the public right to beauty and view under those acts. Thus if A and B own neighboring tracts commanding a view of a New York river covered by one of the acts, and if B proposes to grow four trees on his tract in such a spot that they will eventually obstruct A's view of the river and its environs,¹³⁹ A's suit for an injunction to restrain B from planting his few trees on the ground that such an enterprise would violate the public right to beauty and view would fail except in the unlikely event that A could show that B's execution of his tiny project would materially conflict with the government's objectives¹⁴⁰ and so infringe the public right. A would then probably be without a remedy, even if he were able to show that as between him and B, B's plan was unreasonable. *Ledyard v. Ten Eyck*¹⁴¹ would prevent A from obtaining an injunction on the theory that he had a right to view at common law; and, as pointed out above, it is unlikely that the wild river acts would be construed as creating private rights to beauty and view.¹⁴² In short, while these acts should afford the owners of land riparian to or commanding a view of rivers covered by the acts considerable protection, that protection is not complete, and leaves need for legislation creating private rights to beauty and view which would give their owners an effective weapon for use against unreasonably inconsiderate neighbors even when their conduct does not involve a violation of a public right.^{142a} While it is true that the

public interest in attractive scenery cannot be adequately served without the recognition of public rights to beauty and view,¹⁴³ it is submitted that private rights to beauty and view are worth creating in owners of land riparian to or commanding a view of a lake or stream because of the importance they would have for such owners in cases similar to *Ledyard v. Ten Eyck*; that is, in cases which are of considerable moment to the individuals involved although they are in regard to areas too small and people too few to come within the purpose of legislation designed to protect the public interest in natural scenery.¹⁴⁴

It should be noted, however, that opposition to the creation of private aesthetic rights in lakes and streams has been expressed in the final report of the National Water Commission to the President and the Congress in the following words:

"The Commission believes that State laws should be improved to provide greater protection of social values in water. Specifically, legal rights should be created in the public for such social uses as esthetics, recreation, fish and wildlife propagation...¹⁴⁵ Some have argued that private persons should be awarded water 'rights' in the social values of natural streams. The Commission notes that preservation of important natural stream values will simultaneously protect private as well as public interests in those values no matter in whose name the values are protected. For example, if a proprietor develops a resort adjacent to scenic waterfalls, he will be vitally interested in the preservation of the falls. But that interest will be protected as effectively through a reservation by the State of sufficient water to sustain the falls as by granting a private water right to the proprietor. The only material difference would be that all members of the public, including the proprietor and his guests, would be the designated beneficiaries of the right rather than the proprietor and his guests alone. To this extent, then, private interests are protected through public rights which safeguard stream values.^{145a}

The Commission believes the public interest is better served through procedures such as the one just illustrated than by awarding rights for the social values of natural streams to private individuals. The latter course of action would result in a number of private individuals holding water 'rights' to natural stream values, and would raise difficult and complex questions. For example, could the public be denied enjoyment of instream social values by the private water right owners? Could such owners sell and transfer their private rights to these social values? Would these rights descend to the heirs of the owners?"¹⁴⁶

It is submitted, however, that the Commission has not made a conclusive case for its rejection of private aesthetic interests in lakes and streams. As already pointed out, conduct by B which would be harmful and unreasonable as to A, might not in some instances constitute a violation of the public right to be created by reservation; and in that event A would have no remedy.¹⁴⁷

Moreover, while it is true that the creation in private individuals of social values in lakes and streams such as rights to beauty and view would in some instances, raise difficult and complex questions, an assumption that this would be so in all situations is unwarranted. If, for example, the State of New York, for some public purpose, such as the service of the public interest in recreation,¹⁴⁸ should authorize the public to engage in activities on the waters of Cayuga Lake which would seriously impair its natural beauty, and if owners of land riparian to or commanding a view of that lake, and relying on their statutory rights to beauty and view, should seek an affirmative answer to the question which the Commission put by way of illustration: viz., whether the public could be denied enjoyment of inlake or instream social values by private water right owners, it is reasonably certain that the New York courts would refuse to give such an answer in this instance; for title to the bed of Cayuga Lake is in the state,¹⁴⁹ and, as already pointed out, in such case the state has a sovereign power over the lake enabling it to devote its bed and water to any public

purpose without compensating owners of riparian¹⁵⁰ or other land¹⁵¹ for the infringement of whatever common law or statutory interests in the lake they had prior to the state's exercise of its sovereign power.¹⁵²

It must be admitted, however, that the Commission's question as to whether if private recreational and aesthetic rights were created in lakes and streams, the beds of which are in private ownership, the public could be denied enjoyment of inlake and instream social values by the private owners of such rights could be difficult and complex, as the Commission suggests. Suppose, for example, that A owns land riparian to a New York lake the bed of which is owned by private parties despite its navigability;¹⁵³ that the owners of all the land riparian to and underlying the lake execute deeds conveying to each other the privilege of boating, fishing and swimming over the entire lake;¹⁵⁴ that thereafter, as herein recommended,¹⁵⁵ legislation is enacted creating rights to beauty and view in owners of land riparian to or commanding a view of the lake; that all the land riparian to it, except small areas not less than 100 feet from the shore on which cottages stand, is heavily wooded; that the cottage docks are small and unobtrusive; that B, the owner of a tract riparian to and extending into and underneath the lake, conveys it to the State of New York; that the state, in order to give access to the lake to the public constructs a marina, a gasoline filling station, boat launching apparatus and sanitary facilities on its riparian tract, and invites the public to make use of the tract and its installations for recreational purposes; that the clearing of woods from the state's tract and the erection of structures upon it have greatly impaired the beauty of the prospect visible from the lands of many of the riparian owners; that the public have used the state's tract and facilities so intensively, so inconsiderately and in such numbers that the use and enjoyment of the lake by the private riparian owners for recreational boating, fishing and swimming has been substantially interfered with and has become unsafe; that the state's installations could at reasonable expense be so altered as to make them less obtrusive and unsightly; and that the private riparian owners seek an injunction requiring the

state to make such alterations and so to limit the number of persons who may be allowed to use its tract and facilities at any given time that their activities will not interfere to an unreasonable extent with the safe and reasonable enjoyment of the recreational values of the lake by the private riparian owners.

If a New York court were to be confronted with such a case, it could scarcely avoid the Commission's question: viz., whether the public recreational privileges and rights created by the state in its licensees could and should be curtailed to any extent at the behest of the holders of private recreational and aesthetic interests in the lake; and in this instance the court could not dispose of that question favorably to the state simply by saying that the state, as an exercise of its sovereign power, could, in furtherance of a public purpose, confer on its licensees privileges to use the lake as extensive as it wished to, and could deal with the lake as it saw fit: for the New York courts have several times taken the position that the state's sovereign power does not extend over bodies of water the beds of which are in private ownership.¹⁵⁶ Nor could the court hold that the privilege of every member of the public to operate watercraft on any navigable body of water to which he has lawful access precludes the plaintiff's insistence on the imposition by the state for their protection of some limit on the number of boats which could be launched from its riparian tract on any given day; for in New York the public's navigational privilege does not include recreational boating.¹⁵⁷

In view of the unavailability of such short answers to the question to which the Commission correctly says that the creation of private recreational and aesthetic interests in lakes and streams would give rise, and of the knotty subsidiary problems which would have to be dealt with in order to arrive at some other answer, there can be no doubt but that the Commission's illustrative question can properly be characterized as difficult and complex. It could not be answered, for example, without findings as to what would constitute a fair division of the recreational privileges in the lake between the state's licensees and the private riparian owners,¹⁵⁸ and as to whether the need for public recreational facilities in the state is so great that the

state should be allowed to maintain unsightly public recreational facilities which substantially impair the beauty of the lake and its setting to the damage of the plaintiffs when the appearance of the facilities and the site could be substantially improved at reasonable expense.

It is unlikely, however, that a New York court would conclude that the questions involved were so complex and difficult that the plaintiffs' suit should be dismissed on that ground. As already pointed out, it is in many instances very difficult, by the application of the standard of reasonableness and its attendant criteria,¹⁵⁹ to find answers to the questions which arise in litigation involving the well established private interests in lakes and streams, such as the privileges and rights with respect to the use of water for irrigation or for power production.¹⁶⁰ Yet the courts, despite the difficulty, continue to render decisions as to reasonableness and legality in such cases. Moreover, the question as to the common law recreational privileges and rights and the statutory aesthetic rights involved in the hypothetical case under consideration is substantially the same as and so no more difficult than the one which the court is called upon to face when dealing with a case involving economic rather than social values: viz., whether it would be reasonable in view of all the circumstances to protect the privileges and rights claimed by the plaintiffs and to curtail the activities of the defendant in order to effect such protection.

Among the cases tending to support the prediction made in the preceding paragraph is *Pierson v. Speyer*¹⁶¹ in which the New York Court of Appeals clearly indicated its belief in the practicability of applying the reasonableness standard and criteria to a defendant's claim of a privilege to dam a stream in order to create an ornamental pond on his land by referring to some of the factors bearing on reasonableness and by reversing a judgment granting plaintiff's prayer for an injunction against the maintenance of the dam on the ground that the trial court had made no finding as to whether the defendant's impoundment of the stream was reasonable.¹⁶²

An example of the actual application of the reasonableness standard with its attendant criteria in an action to protect private recreational interests is afforded by *Florio v. State of Florida*¹⁶³ in which the plaintiff riparian owners sought an injunction restraining the defendant riparians and their lessees from use of a 75-acre lake for water skiing. The appellate court, after noting that the defendants' activities were seriously harming plaintiffs and were "too big" for the lake, and so after applying the harm and suitability criteria, reversed a judgment restraining defendants from all water skiing on the lake whatsoever, but directed the trial court to frame an injunction requiring the defendants to refrain from such water skiing as would interfere to an unreasonable extent with the plaintiffs' enjoyment of their recreational privileges with respect to the lake.¹⁶⁴

Even more pertinent to a consideration of the question put by the Commission which a court would have to answer if faced with the hypothetical case under consideration: viz., whether the public recreational privileges and rights created by the state in its licensees could and should be curtailed to any extent in order to protect the private recreational and aesthetic interests in the lake - are court opinions indicating that the public's social interests in a body of water can and should be restricted to a reasonable extent when a failure to do so would result in an interference to an unreasonable degree with the enjoyment of private recreational privileges and rights in the stream involved. Prominent among these opinions are those in *Botton v. State of Washington* in which it appeared that the plaintiffs owned all of the land surrounding a non-navigable lake and all of its bed except the part of the land riparian to the lake and the part of the bed which the State of Washington had acquired by purchase and had developed to be used as a fishing area open to any member of the public; that those who gained access to the lake over the state's tract not only frequently trespassed on plaintiffs' lands and docks, but relieved themselves in the lake, hunted and shot thereon in violation of law, so operated speed boats as to endanger plaintiffs' children, and so used the lake as to interfere with plaintiffs' enjoyment of it for boating, swimming, fishing and recreation; and that the court enjoined the state from allowing the public access to the lake via the state's riparian tract "until the state...presents a plan for the controlled operation of its property that satisfies the

trial court that the rights of other riparian owners will be adequately safeguarded." In support of this decree the court said inter alia:

"We do not question the right of the state, as a riparian owner, to ignore the county's zoning regulations and to permit the public, as its licensees, access to the lake over its property.¹⁶⁵ There is, however, a limitation, and that is that it cannot permit such use of its property as constitutes an unreasonable interference with the rights of the other riparian owners...The state, as a riparian owner, does not have to acquire by condemnation the rights of the other riparian owners before it permits fishermen in reasonable numbers access to the waters of Phantom Lake; but it does have the obligation, and counsel for the state so concede, to so regulate the number and conduct of its licensees as to prevent any undue interference with the rights of other riparian owners...The state is entitled to all the rights of a riparian owner, but it should also accept the responsibility of a riparian owner for the conduct of its licensees."¹⁶⁶

Here then is a case which not only shows the court's belief in the effective utility of the standard of reasonableness in litigation involving recreational interests in lakes and streams, as does Florio, but in addition gives an affirmative answer to the Commission's question, and provides authority for the proposition that private recreational privileges and rights in lakes and streams can be defended even at the expense of public recreational interests therein, if the public interests involved are not based on the state's sovereign power, and if the public is exercising its privileges in an unreasonably harmful manner.¹⁶⁷

It would seem, moreover, that Botton furnishes strong support for the conclusion that the owners of private rights to beauty and view could and should be defended against unreasonable interferences with those rights by the public; for although no private rights to beauty and

view were involved in *Botton*, it would seem entirely reasonable to take the position that if private boating, fishing and swimming privileges and rights are enforceable against the public, private rights to beauty and view should be also. After all, since aesthetic interests, like those in boating, fishing and swimming, fit comfortably into the recreational category, they should receive as much protection as do the other members of that group.¹⁶⁸

Of course acceptance of *Botton*, together with the corollary just suggested, would involve the proposition that when the enjoyment of public recreational interests in lakes and streams over which the state cannot exercise its sovereign power, conflicts with the enjoyment of private interests therein, the courts must resolve the conflict by balancing the competing interests by the application of the riparian doctrine's standard of reasonableness. Nevertheless, since the state's interest in the case under consideration is acquired from private parties and is reasonable rather than absolute,¹⁶⁹ the state can scarcely be heard to object to its being weighed in the balance against the interests of private persons.

While the numerous cases holding or declaring that private recreational interests in lakes and streams over which the state has no sovereign power cannot be taken by the state or impaired by it to an unreasonable extent unless the state compensates the aggrieved owner¹⁷⁰ are not strictly in point with respect to the Commission's question and our hypothetical case, they afford general support to the above conclusion that the state can expect a preference only when, under all the circumstances, it is reasonable to give it one. Surely if, as is the case, the courts can limit the scope of a state interest as important as its interest in free speech in order to give reasonable protection to the rights of private landowners to freedom from trespass,¹⁷¹ there can be no doubt of the power of the courts to limit the public in its exercise of recreational privileges and rights in lakes and streams not subject to the state's sovereign power, when that exercise is so intense and extensive as to interfere unreasonably with the enjoyment of private recreational privileges and rights in such bodies of water.

The Commission's second specific objection to the creation of private rights in the social values of lakes and streams: viz., that such a step would give rise to difficult and complex questions in regard to the transferability and inheritability of such rights - appears to be even less serious than the one just discussed. It is well established that riparian privileges and rights in general, as constituent elements of an estate in riparian land, pass by a conveyance of such an estate by deed or by will, or by intestate succession to such an estate,¹⁷² just as the rights to freedom from trespass and from nuisance, and the privilege and power of alienation, which are component parts of estates in land regardless of its location, pass to the grantee or devisee of or to the heir to an estate in land of any description. Thus a deed of an estate in riparian land has been held to carry with it the riparian privilege of using stream water for power,¹⁷³ and the riparian right to the natural flow of the stream, subject to its reasonable use by upper owners.¹⁷⁴ Why then should not a grantee or devisee of or an heir to an estate in land which comprises private common law riparian boating, fishing or swimming privileges or statutorily created private rights to beauty and view succeed to such interests?

Although the Commission seems to fear the possibility that if private privileges and rights in regard to the social values of lakes and streams which are now recognized in many states¹⁷⁵ are allowed to continue in existence or are increased in number, they would give rise to serious problems for owners of the land which was subject to such interests whenever the benefitted land passed into the hands of numerous devisees or heirs,¹⁷⁶ that possibility would appear to be a distinctly novel and far from cogent reason for deciding that it would be advisable to abolish such private interests and that it would be unwise to add any new interests of this sort to the aggregate of rights, privileges, powers and immunities constituting an estate in land riparian to or commanding a view of a lake or stream. To be sure, the possibility that non-commercial easements of way in gross might be succeeded to by many devisees or heirs, and therefore difficult to extinguish, may be a valid argument against permitting the transfer of such easements and hence their possibly

perpetual duration;¹⁷⁷ but this would be because such easements have too little value to the public to offset the hindrance to the alienability of the servient tenement which their perpetual existence would constitute.¹⁷⁸ When, however, the interests under consideration are constituent elements of a possessory estate, there should be no question as to their transferability with it; for a possessory estate seems always to have been viewed as of sufficient value to justify its potentially perpetual duration and its transferability with all of its parts, including certain rights often added by contract or by grant,¹⁷⁹ which are basically similar to the rights to beauty and view which it is proposed to create, since like the proposed rights, they restrict the mode of use and occupation of the burdened land. It is submitted therefore that unless an attempt were made to separate the private privileges and rights in regard to the social values of lakes and streams from the estates of which they are constituent elements at common law or from the estates to which they might be added by statute, by conveying them apart from such estates or by reserving them when conveying such estates, no problem whatsoever in regard to their transferability should arise as a result of their creation, let alone one concerning their transferability that could seriously be characterized as difficult and complex.¹⁸⁰

But assuming that questions which conceivably could be labelled difficult and complex might arise if the private common law privileges and rights in regard to the social values of lakes and streams are allowed to continue in existence, if new statutory rights to beauty and view are created, and if the owner of an estate in land which comprised such interests should attempt to sever one or more of them from that estate, would the difficulty and complexity of the ensuing questions be so great that the legislature would regret having created the situation which made it possible for the courts to be confronted with them? It would appear that this question can be answered in the negative; for the questions which such an attempt to sever would raise would be substantially the same as and actually no more difficult and complex than those raised by attempts to sever private common law riparian privileges and rights in regard to the economic values of lakes and streams from the estates

in which they are comprised; questions which the courts have many times answered correctly without apparent strain. The rule that seems to be inducible from the cases involving attempts to sever private common law riparian interests and from the decisions as to the transferability and potential duration of non-commercial easements in gross, seems to be that the attempt will be successful, provided the party asserting that the privilege or right survives the attempt and exists as an interest separate from the estate of which it was a part can show that he can derive some legitimate benefit from its preservation, and that the value to the public of that benefit is large enough to outweigh the undesirable decrease in the alienability of the servient estate caused by the continued existence of the severed interest.

Among the numerous cases in which an attempt to sever a common law riparian privilege was held successful and in which the grantee of the privilege was allowed to exercise it,¹⁸¹ is *United Paper Board Co. v. Iroquois Pulp & Paper Co.*,¹⁸² in which it appeared that the owner of two tracts of land riparian to a river had executed a deed purporting to convey the lower tract and part of the water power privilege constituting an element of the fee simple estate in the upper tract. Although the court did not expressly give as reasons for its decision the grantee's ability to use the severed part of the power privilege to its considerable advantage, nor the fact that the estate the value of which the privilege enhanced was possessory and in fee, the court made it clear that these facts existed. They cannot therefore be overlooked when deciding for what holding the case can be cited.

That an attempted severance of a common law riparian privilege by reservation may also be successful under similar circumstances is established by *Thurston v. City of Portsmouth*¹⁸³ in which it appeared that a railroad conveyed to W a part of its land riparian to a river by a deed reserving all riparian rights; that the plaintiff became the owner of the land conveyed to W; that the defendant obtained a grant of the riparian rights attempted to be reserved; that the defendant began to deposit fill on the bed of the river in front of plaintiff's land for the construction of a roadway; that the plaintiff claimed that as the railroad had retained no riparian land when attempting to reserve its

riparian rights, the attempted reservation was void; that the plaintiff therefore owned such rights, and that the defendant was violating them. It also appeared that the plaintiff had sought an injunction restraining the alleged violation, and that the plaintiff was appealing from a judgment sustaining the defendant's demurrer to the plaintiff's bill. In affirming the judgment the Virginia Supreme Court asserted that it was well established in Virginia and in most other states that riparian rights, as valuable property interests, are severable from the riparian land to which they are incident. Although the court did not point to the defendant's ability to make beneficial use of the riparian privilege of access to navigable waters in connection with the possessory estate it apparently owned in the river bed in front of plaintiff's land as one of the reasons for its decision, it seems likely that it would have reached a different result if the defendant could not have lawfully made such a beneficial and important public use of this access privilege, which included the privilege of filling in, by obtaining access to the river, and so the area to be filled, from land other than that of the plaintiff, and so without committing a trespass; for this aspect of cases involving attempts to sever the riparian privilege of access was carefully explored in *Hanford v. St. Paul & Duluth Rr. Co.*,¹⁸⁴ one of the authorities cited and relied on by the court.

There is, however, authority for the proposition that not all common law riparian privileges and rights are severable from the estates in which they are comprised. Although in *Hanford*, as in *Thurston*, the court permitted the severance of the privilege of access to navigable water, the court said:

"We do not affirm that all riparian rights are thus severable. Some, from the very nature of things may be incapable of separate existence."¹⁸⁵

A situation to which any court might well believe that this warning was applicable was indicated by the Ohio Supreme Court when it pointed out that while in *Hanford* the severance of a riparian interest was permitted, it was not held

"that one may own that which he cannot enjoy."¹⁸⁶

In other words, the Ohio court's position appears to have been that the reserver or grantee of a riparian privilege or right will not actually be able to enforce it if his circumstances are such that he cannot derive any legitimate benefit from the enforcement, and so would have nothing with even the slightest public value to outweigh the clog on the title to the servient tenement which the continued existence of the severed riparian interest would maintain.¹⁸⁷ It seems clear, moreover, that the hope of extorting an exorbitant price from the owner of the land burdened by the privilege or right attempted to be severed would not constitute a benefit sufficiently legitimate and important to justify a holding that the attempt to sever had been successful.¹⁸⁸ Furthermore, if the plaintiff's malice were established, his hope to extort would not entitle him to the benefit of the New York cases holding that a plaintiff's malice will not bar his recovery if his suit is also motivated by a socially acceptable purpose.¹⁸⁹

Since it appears then to be the rule that attempts to sever such familiar common law private riparian interests as the power production privilege and the privilege of access to navigable water from the estate in riparian land of which they are constituent elements will be successful unless it develops that the claimant of the severed interest will be unable to make any legitimate use of it, or that the benefit which he can derive from such use is too small to offset the decrease in the alienability of the servient tenement which it will cause, and since no reason is readily apparent why this rule should not also be applied to attempts to sever the common law private riparian interests in regard to the social values of lakes and streams such as the privileges of boating, fishing and swimming, and to attempts to reserve or convey statutory additions to the list such as the recommended rights to beauty and view, it seems safe to predict that the courts will be able without undue difficulty to continue to deal satisfactorily with attempts to sever the common law members of the group, and to work out sound solutions with relative ease if confronted with problems resulting from the creation of statutory rights to beauty and view for the benefit of owners of land riparian to or commanding a view of a lake or stream.

If, for example, A, the owner of a tract of land riparian to and including part of the bed of a lake, executed a deed to B, the owner of an inland non-riparian tract abutting on A's, purporting to convey a right of way to the lake over A's land together with the privilege of swimming in the lake, what effect would a New York court be likely to give to A's conveyance? As the swimming privilege was granted along with the right of way, and as the deed contained no reference to riparian privileges as such, the court would probably take the obvious route, and hold that the deed accomplished what it clearly purported to do: viz., that it had granted right of way and swimming easements appurtenant to B's non-riparian tract;¹⁹⁰ and would not pause even briefly to consider the question as to whether the conveyance involved an attempt to sever the riparian swimming privilege by conveyance, and the further question as to whether the attempt had been successful. Moreover, the swimming easement created would probably be construed as non-exclusive and so subject to A's continued enjoyment of his riparian swimming privilege, since, unless the grant specifies to the contrary, the grantor can make any use of the servient tenement which does not unreasonably interfere with the grantee's enjoyment of the privileges granted him.¹⁹¹

If, however, A had purported to grant to B A's riparian swimming privilege or the swimming privilege incident to A's riparian tract, together with a right of way to the lake over that tract, a New York court might well feel constrained to interpret the deed literally, and to treat it as an attempt to sever a riparian privilege by conveyance. But the practical result would be the same as would have been brought about if A had given a deed expressly purporting to convey swimming and right of way easements. B's possession of lawful access to the lake would enable him to derive a legitimate advantage from the swimming privilege; and since the right of way which B acquires will become an easement appurtenant to the inland tract,¹⁹² while the swimming privilege granted him will become a component part of his estate in that tract,¹⁹³ the benefits of the transaction accrue to a possessory estate in land, which, as we have seen, makes them of sufficient importance to outweigh the diminution in the alienability of A's riparian tract which results

from his grant of the privileges.¹⁹⁴ Thus the condition which appears to be prerequisite to the success of an attempt to sever a common law riparian privilege from the estate of which it is a constituent element would be satisfied. And the questions which the court has to answer en route to this result are not so difficult and complex as to justify the position that private interests in regard to the social values of lakes and streams should not be tolerated.

While a question might arise in the case just supposed as to whether B did not take an exclusive swimming privilege, because A purported to convey his swimming privilege or the one incident to his riparian tract without reserving any part of it,¹⁹⁵ the emergence of this question, which might indeed prove to be a difficult one in some cases, could not fairly be viewed as a consequence of a decision to recognize the existence of private riparian interests in regard to the social values of lakes and streams, since the real origin of the question referred to is A's failure completely to express his intention, an omission which will cause difficulty whenever a court has to construe a conveyance; and since difficulty of this sort can never be completely avoided unless the power and privilege of alienation of property interests are completely abolished.

But suppose that A, the owner of a tract of land lying between a public highway and a lake and having contact with both, executes a deed to C purporting to convey a right of way from the highway to the lake across A's riparian tract together with the privilege of swimming in the water overlying the part of the lakebed owned by A, what interests would a New York court hold had been created in C? As the words of the deed make no express reference to A's riparian swimming privilege, it would be rather difficult for the court to conclude that A intended to transfer that privilege either in whole or in part.¹⁹⁶ The court then would probably hold that C had acquired two easements, neither of which was appurtenant to a possessory estate, but each of which might well be viewed as appurtenant to the other.¹⁹⁷ Or perhaps the court might conclude that a single easement in gross comprising the right of way and the swimming privilege had been granted to C. If called upon to decide whether his interest was transferable the court would be likely to hold that it was not; that it was personal to C and could not be conveyed by him by deed or by will and would not pass to his heirs by intestate

succession; for although C could, because of his acquisition of the right of way, derive substantial and legitimate benefit from the swimming privilege, that benefit, since it was not for the advantage of a possessory estate, would not be sufficiently important to the public interest to warrant the decrease in the alienability of A's riparian tract which would result from holding C's easements or easement to be transferable and so of potentially infinite duration. Granted that some non-commercial easements in gross can be held transferable in appropriate cases, there are no facts assumed in this case on which such a conclusion could be based, such as language in the deed clearly pointing toward transferability, or the payment by C of a larger price for the easements than a buyer would normally be willing to give for them if they had been merely personal.¹⁹⁸

If, on the other hand, A had purported to transfer to C A's riparian swimming privilege or the swimming privilege incident to his riparian tract, together with a right of way to the lake over that tract, the court, as pointed out in the discussion of a similar hypothetical case previously put,¹⁹⁹ would have a sound reason for holding that A had attempted by conveyance to sever his riparian swimming privilege from the possessory estate of which it was a part; but it is probable that the court would in this instance hold the attempt to be only partially successful. While C's possession of the right of way would enable him to derive a substantial and legitimate benefit from the swimming privilege, C has no possessory estate in land which these privileges could benefit or into which the riparian swimming privilege could be absorbed as a component part.²⁰⁰ It would not be surprising therefore if the court concluded that the personal advantage which C would derive from the swimming privilege would not be large enough to justify the clog which would be put on the alienability of A's riparian tract by holding that his attempted severance of his riparian swimming privilege was completely successful; i.e., had resulted in C's acquisition of a fully transferable riparian swimming privilege in gross of potentially infinite duration. Indeed it is conceivable that the court might hold that the severance attempt was a complete failure and gave C no swimming privilege of any kind, because of his inability to show complete

fulfillment of what is apparently the prerequisite to the severance of riparian interests from the estate in which they are comprised.²⁰¹ If, however, as seems more likely, the court should elect to follow the analogy afforded by the non-commercial easement in gross cases, it could without difficulty hold that C was intended to take and did receive a riparian swimming privilege which was personal to him, and so was not transferable either by conveyance or intestate succession. Whether if a clear expression of intent to create in C a transferable riparian swimming privilege of potentially infinite duration were included in the deed and if C had paid a large price for the grant, the court would accept the Property Restatement position in the field of non-commercial easements in gross and hold that C had acquired a transferable interest is, of course, a speculative question which should, however, be answered affirmatively.²⁰² In any event that question, difficult and complex as it might turn out to be in some instances, is not so much so that it cannot be left to the courts with confidence, as corresponding questions with respect to non-commercial easements in gross have been left. Certainly the possibility that the courts might be faced with it is not a sufficient reason for abolishing the private riparian interests in regard to the social values in lakes and streams which have long existed in many states and in which thousands have invested in good faith.²⁰³

But if the recommended rights to beauty and view were to be added by the New York legislature to estates in New York land riparian to or commanding a view of a lake or stream, would such a step give rise to questions in regard to the transferability and inheritability of such rights which would prove to be more complex and difficult than those which will continue to confront the New York courts if the common law privileges and rights in regard to the social values of lakes and streams now existing in New York are not abolished, and which upon examination have turned out to be no more difficult and complex than other similar questions with which the courts have for a long time dealt with satisfactorily?²⁰⁴ If, for example, A, the owner of a riparian tract, should convey it to B by a deed purporting to except such rights

to beauty and view from the conveyance or to reserve them to the grantor, would the question as to the extent, if any, to which this attempt at severance was successful be any more difficult and complex than those which would arise if a grantor of riparian land had attempted to effect a severance of his riparian swimming privilege by excepting or reserving it when conveying his estate in his riparian land?²⁰⁵

It would seem that this question can be answered in the negative. Surely it is clear that A could not persuade the court to hold that the rights to beauty and view remained in existence in his hands; for having parted with the land which they benefitted, he can derive no socially legitimate advantage from their possession.²⁰⁶ If A argues that these rights should be kept alive as his property because C, the owner of a nearby tract, wishes to execute a project thereon which would impair the beauty which could be seen from the land which A conveyed to B, and that if A still has the rights, he could exact a good price from C for their release, it can be replied, as in the case of an attempt to sever a common law swimming privilege by a party similarly situated and motivated that the power to extort is not a legitimate benefit from the standpoint of the public interest;²⁰⁷ and that the only question is whether to hold that B acquired the rights because the attempt to sever them under such circumstances was a nullity, or that the rights were extinguished because that was what A probably intended to accomplish and what B apparently acquiesced in.²⁰⁸

It is quite certain that the New York courts would feel free to choose the nullity alternative for which their application in the elevated railway cases of the general rule that appurtenant easements cannot be successfully reserved when the dominant tenement is conveyed²⁰⁹ would furnish persuasive analogical authority. For one thing, both the easements of air and light held to be non-severable by reservation or otherwise in the elevated railway cases,²¹⁰ and the rights to beauty and view under consideration are negative in character in that they enable their owner to restrict the conduct of others on their own land;²¹¹ for the easements of air and light comprise rights that no one shall interfere with the receipt by abutting owners of the air

and light which would normally reach their premises from the street;²¹² and the statutory rights to beauty and view would enable their owners to prevent others from doing acts which would impair the beauty of a lake or stream to an unreasonable extent or would obstruct the view of that beauty to an unreasonable degree.²¹³ In the second place, although New York courts have been silent as to the policy considerations supporting their holdings that an abutting owner's easements of air and light cannot be severed from the dominant tenement,²¹⁴ it is obvious that this rule can rest on the same basis on which the decision that a riparian interest is non-severable is founded in certain instances: viz., that an attempt at severing such an interest from the estate of which it is a constituent part will not be allowed to succeed if the person arguing for the success of the attempt is not in a position to derive any socially legitimate benefit from ownership of the interest.²¹⁵ Moreover, the analogy afforded by the elevated railway cases could be relied on by the courts, even if they decided that the new rights to beauty and view were components of the estates in the land which they benefitted rather than negative easements appurtenant thereto; for the rights would still be negative in character, and the reservor of such rights would still be unable to derive any legitimate advantage from their continued existence. Although a holding that the parties had agreed on the extinguishment of the rights for one purpose or another would be a genuine alternative, it seems unlikely that a court would elect it unless the admissible evidence clearly pointed to that conclusion.²¹⁶

If instead of conveying his land to B and attempting to reserve his rights to beauty and view, A attempts to convey those rights to B while retaining the land, the courts, in view of the considerations adverted to in the above discussion of attempts to sever these rights by reservation, would undoubtedly arrive at conclusions substantially similar to those they would reach in a reservation case: viz., that in no event could the rights exist in B's hands as enforceable interests; for they are rights that the beauty of A's prospect shall not be impaired or the view of it obstructed; and that B therefore could not show that he himself could derive any benefit whatever from an ability to enforce them except the power to extort a price from persons who wished to do acts

on their lands adversely affecting A's prospect, and that the possession of such a power could not be deemed to be a legitimate benefit to B. Moreover, as when A attempts to sever his rights by reservation, the court would decide that it must choose between holding the attempted severance a nullity or interpreting it as a release, and that this choice would be controlled by the intention of the parties as indicated by the words of the deed interpreted in the light of the attendant circumstances. For example, if B owned land lying between A's tract and a lake, so that a release of B from the burden of A's rights would give B more freedom in the development of his land, the court might well interpret A's conveyance of his rights as such a release.²¹⁷ On the other hand, if B could derive no benefit from the release because he owned no land the use of which was restricted by A's rights to beauty and view, the court would be apt to hold that the attempted severance by conveyance was a nullity, unless there was strong evidence of an intention that A wanted to abandon and so extinguish his rights altogether because for one reason or another he wanted his neighbors to be less restricted in the use of their lands.

In short, it would appear that the questions which the courts would encounter if the recommended statutory rights to beauty and view were created would be no more difficult and complex than those which it will have to continue to answer if the common law private riparian privileges and rights in regard to social values in lakes and streams are allowed to remain in existence, and are therefore clearly not so formidable as to make it unwise for the New York legislature to create private rights to beauty and view in the owners of land to or commanding a view of a lake or stream. If these questions were indeed so forbidding the legislature should enact a statute prohibiting the creation of rights to beauty and view by contract or by grant;²¹⁸ but no such suggestion seems ever to have been made. And whatever slight doubt there might be as to whether the courts would reach the desirable results predicted above should they be confronted with cases involving the severability of the proposed statutory rights to beauty and view could, of course, be eliminated by including in the legislation creating such rights provisions indicating the effects of attempts to sever them by reservation or transfer in various situations.

That the National Water Commission should have envisaged as mountains the objections to the existence of private interests in regard to the social values of lakes and streams which are described herein as molehills is not entirely surprising. In the western states the legislatures, the courts and the general public have been persistently indifferent to such interests. For a long time their concern was mainly over the economic values of lakes and streams, which is not surprising in newly opened country.²¹⁹ While public interests in their social values have for some time now been receiving much more attention than formerly,²²⁰ the general tendency in the west still is to keep private interests in the social values of lakes and streams at the bottom of the totem pole.²²¹ And as all but four of the fourteen lawyers who served as members of the Commission's legal division and as its legal consultants were drawn from the western bar or from the faculties of western law schools,²²² and would naturally lean toward the view that the attitude which had been maintained in the west for 125 years was the correct one, it is not surprising that the Commission's report included the expression of opposition to the existence of private rights in the social values of lakes and streams hereinbefore quoted.²²³ It is to be hoped that the following passage in that report can be read as applying to such interests as well as to private interests in the economic values of lakes and streams; but as the passage does not expressly purport to do so, and as the statement that the existence of such interests is not desirable appears on the page immediately following the one on which the below-quoted statement is set forth, it is regrettably difficult to interpret it as approving what is asked for herein: viz., the protection of private interests in the recreational, aesthetic and other social values in lakes and streams.

"The major challenge facing the Eastern States is to achieve a better balance between public use and private use of water resources. Economic development and social purposes can both be served, and riparian rights can be protected if Eastern State laws continue to recognize private riparian rights but only to the extent of a minimum flow of reasonable quality, adequate to serve reasonable riparian (private) needs and interests."²²⁴

Constitutional Problems
 Statutes Creating Private Aesthetic Interests in Lakes
 and Streams as Police Power Measures

Does the Present Version of sec. 15-0701 of the New York Environmental Conservation Law Constitute a Valid Exercise of the State's Police Power, or would its Enforcement Involve an Uncompensated Taking of Property in Violation of the Due Process Clauses? If that Section were Amended so as to Purport to Establish not only in Riparian Owners but also in Owners of Land which, although Non-riparian, Commands a View of a Natural Body of Water, a Right that its Beauty and that of its Setting shall not be Impaired or the View thereof from their Lands Obstructed by any Person to an Unreasonable Extent by an Alteration in the Body of Water or by any other Act, would the Section Qualify as a Valid Police Power Measure, or would it be Stricken Down on the Ground that its Enforcement would Constitute an Uncompensated Destruction of Property Interests in Violation of the Due Process Clauses?

Suppose that A and B are owners of tracts of land riparian to a lake; that the only use which A makes of the lake is to view its beauty from his lakeside cottage and grounds; that after the effective date of sec. 15-0701 B began to withdraw so much water from the lake to irrigate his crops that unsightly mud flats were exposed by the lake's recession from its shores; and that A, invoking sec. 15-0701 and alleging that B is pumping an unreasonably large amount of water from the lake, seeks an injunction requiring B to reduce his withdrawals, would the court deny A's request on the ground that enforcement of the section against B would violate the due process clauses because resulting in the uncompensated destruction of one of B's property interests: viz., the common law immunity of a riparian owner from liability to

other riparian owners for an impairment of the beauty of their view of a natural body of water caused by an alteration in the body of water resulting from his use of it?²²⁵ Assuming that the section will be construed by the New York courts as giving a cause of action to riparian owners only for impairments of natural beauty which are unreasonable as well as harmful,²²⁶ it is almost certain that they would sustain the section even though they assumed that apart from it B would have the immunity just referred to, and even though they recognized, as they very well might, that the destruction of B's common law immunity would indeed be a taking of his property;²²⁷ for a taking of private property, though uncompensated, does not violate the due process clauses of the federal and New York constitutions if it is effected by a statute which qualifies as a valid exercise of the police power;²²⁸ and as the courts, when determining whether a statute does so qualify, normally apply one or more of the following criteria:²²⁹

(1) the extent to which the statute, if upheld, would modify or impair the property interest of the person asserting the unconstitutionality of the legislation;

(2) the extent of the financial loss or other harm which would be inflicted on such person by such modification or impairment;

(3) whether the interests which would be modified or impaired are founded on a substantial equity;

(4) whether such modification or impairment, because unforeseeable, would unfairly disappoint any reasonable expectations of the complaining property owner;

(5) whether the statute would confer any benefits on him which would offset to some extent such loss or harm as the statute might cause him;

(6) whether the public interest which would be served by the statute is that which the public has in the acquisition of property by the state and in the enhancement of the economic value of public enterprises, or is some other interest such as the public has in the prevention of conflicts between neighboring private landowners by an equitable adjustment of their privileges and rights inter se;²³⁰

(7) if the public interest which would be served by the statute is not the first of the two just referred to, the extent to which it would outweigh the private property interest which the statute might modify or impair; and

(8) whether the statute would bear a reasonable relation to the furtherance of the public interest it is designed to serve;²³¹ it seems safe, despite the fact that the boundaries of the police power continue to lack precise definition,²³² to predict that the New York Court of Appeals and the United States Supreme Court would hold that sec. 15-0701 as it now stands is a valid police power measure.

It is important to note, however, that most courts accept the somewhat different view as to what constitutes a taking within the meaning of the due process clauses which Justice Holmes expounded in the famous case of *Pennsylvania Coal Co. v. Mahon*:²³³ viz., that to deprive a landowner of only part of the rights, privileges, powers and immunities which constitute his ownership does not amount to a taking for which he must be compensated but to a mere non-compensable regulation of its use, if the fraction of ownership destroyed by the statute is no larger than is reasonable under all the circumstances.²³⁴ Under this approach to the taking issue it would seem clear that a litigant asserting the constitutional validity of sec. 15-0701 as a police power measure would be even more sure of success than under the approach used by such courts as recognize that the destruction of a privilege of use is in substance a taking of that privilege from its owner; for while the criteria applied by the courts when determining the ability of a statute to qualify as a valid police power measure²³⁵ are substantially the same regardless of which of the two approaches to the taking problem they employ,²³⁶ a court might well find it easier to validate a statute which would curtail a private property interest if it could say that the legislation in question merely imposed a regulation on its use than if it felt constrained to admit that the enforcement of the statute would result in a taking, even though it could point out that the taking would be small.

Or suppose that after the effective date of a statute amending sec. 15-0701 in the respects hereinbefore indicated²³⁷ B, an owner of

land near to but not riparian to a natural stream, proposes to erect a building on his land which would obstruct the view of the stream that A had been enjoying from his tract of land which, like B's, is near but not riparian to the stream; and that A, relying on the amended section seeks an injunction restraining B from erecting the building, would the court refuse relief on the ground that enforcement of the statute against B would violate the due process clauses because it would involve the uncompensated destruction of two of his property interests: viz., the common law privilege of a landowner to use his land as he sees fit,²³⁸ provided his use does not constitute a nuisance, and his common law immunity from liability to his neighbors for nuisance when his use of his land obstructs their view of beautiful scenery?²³⁹ It is submitted that this question can be answered in the negative, and that the amended statute would, like the one now in force, be upheld as a valid police power measure regardless of which of the two methods of dealing with the taking issue the court chose to employ.²⁴⁰

If a court should consider the constitutionality of sec. 15-0701 either in its present form or as it would read with the suggested amendments, in the light of the factors listed above the court would almost surely note that not even the enforcement of the section in its expanded form would involve a complete destruction of the common law freedom of a landowner to erect structure or to perform other acts on his premises without regard to whether his activity impairs the natural beauty of the prospect visible from the land of another or obstructs another's view of such prospect; for the section, whether in its present or amended form would afford relief to a plaintiff landowner objecting to impairment of natural beauty or obstruction of its visibility only when the impairment or obstruction was unreasonable under all the circumstances.²⁴¹ As when determining the reasonableness of the defendant's acts the trier of the fact must take into account inter alia the loss which the plaintiff would sustain if his claim were rejected; the loss which the defendant would suffer if the plaintiff's claim were upheld; the uses to which land in the area commanding a view of a body of water had customarily been devoted; the relative suitability

to the lake or stream of the respective activities of the contesting parties; whether it would be practicable for either of them to do anything to reduce the amount of harm which the defendant's activity was causing the plaintiff; and the relative social values of the uses which the contesting parties wished to make of their respective lands;²⁴² a finding that the impairment of beauty or obstruction of view complained of was reasonable might be expected in an appreciable number of cases. In short, the statutes under consideration would not completely destroy the landowner's common law freedom to ignore the aesthetic desires of others, but would merely reduce the extent of that freedom from unlimited to reasonable; and this moderate effect of the statute would weigh significantly in its favor.

Of course, if the finding on the issue of reasonableness went against the defendant, as it undoubtedly would in many instances, the resulting restriction of his freedom of use might result in the disappointment of expectations that he had entertained when he bought or retained ownership of his premises, and in the loss not only of the profits which the prevented use of the land would have yielded, but of part of his capital land, or for which he had elected not to sell, reflected the higher value which it would have so long as it was free from restrictions imposed in the interest of aesthetics on the type and location of structures which might be erected or of acts which might be performed on the premises.²⁴³ For the view that his expectation as to future possible uses was reasonable, that the loss of profits and capital resulting from curtailment of such uses would be heavier than he should be forced to bear,²⁴⁴ and that his claim against the validity of the statute as to him was therefore founded on a substantial equity something certainly can be said.

It could, however, be argued in reply that as so many owners of land commanding a view of a lake or stream acquired or retained it in the hope of enjoying that view; as such a hope would be entertained by most owners of such land even though it were non-riparian;²⁴⁵ as these facts are doubtless known to most persons who buy or retain land in the vicinity of a body of water, including those who do so for purposes other than aesthetic, and are probably understood by a considerable fraction of the general public as well, it is not entirely reasonable for an

owner of land near a lake or stream, even though he is not a riparian owner, to assume that he will not be required to pay any more heed to the aesthetic desires of his neighbors than he would have to give if his land were far removed from any body of water. Moreover, in view of the wide prevalence of zoning laws, the majority of land owners should be aware of the possibility that the potential uses of any tract of land may be reduced by legislation enacted subsequent to its acquisition.²⁴⁶

But even if it be conceded that these considerations would not afford a conclusive answer to the defendant's objections to the enforcement of rights to beauty and view against him, it should be borne in mind that his situation will not always be really difficult even if his structure or activity is held to constitute a violation of such rights. As a partial offset to the disappointment of expectation and financial loss which enforcement of statutory rights to beauty and view might inflict upon a particular landowner who had acquired his land before creation of such rights, there would be the benefit which he himself might derive from possession of them²⁴⁷ if his land commanded a view of a lake or stream, and if he ultimately decided that he preferred to use his land for either personal or commercial recreational activity. Moreover, it might be possible for him to go ahead with his original unsightly enterprise, if he could buy releases from his neighbors of their aesthetic rights at a price which would permit his project to show a profit. Again, it is conceivable that it might be physically and financially feasible to erect a structure less offensive to the eye and less obstructive of view than the one he had originally planned to build, or to perform whatever act he had in mind in such a way as to diminish substantially its adverse impact on aesthetic values.²⁴⁸

It is true, of course, that in some instances a landowner whose initial plans for construction or other activity would involve infringement of a right to the preservation and visibility of the beauty of a body of water and its setting would suffer disappointment of expectation and financial loss because resort to expedients such as those just referred to would be impracticable in view of his particular situation.

But even in such a case, in the light of the zoning decisions, it cannot be assumed that enforcement of such rights to beauty and view against one who had bought his land prior to their creation, and who would be prejudiced by their enforcement, would in every instance be held to be an unconstitutional taking of property without compensation.²⁴⁹ As it is well established that enforcement of a zoning ordinance furthering the public safety, health or welfare or some other legitimate public interest or purpose can constitute a valid exercise of the police power, even though enforcement of the ordinance against the landowner attacking it would disappoint his expectations and cause him considerable financial loss, provided enforcement would not bar him from all the uses to which his land is reasonably adapted,²⁵⁰ it seems reasonable to expect that the courts would hold that the legislation creating the new rights to beauty and view under consideration would likewise constitute a valid exercise of the police power, even though their enforcement would result in disappointment of expectations and financial loss to an objecting landowner provided that despite curtailment of his common law freedom of choice with respect to land use it would still be possible for him to make a use of his land to which it was adapted. As in the zoning situation,²⁵¹ important public interests would be served by such a holding: viz., the public interest in the satisfaction of the aesthetic desires of the thousands of its citizens who are owners of New York land riparian to or commanding a view of a natural lake or stream;²⁵² and the public interest in the prevention and resolution of conflicts within the private sector of society by effecting an equitable adjustment of the privileges and rights of private landowners as among themselves. Legislation designed to accomplish such an adjustment has often been held or assumed to be a valid exercise of the police power.²⁵³

But can it be argued that the suggested analogy between statutes creating new rights to beauty and view and zoning ordinances cannot be relied on to support the constitutionality of the former in all situations because, according to the weight of authority, a zoning ordinance enacted solely for the purpose of protecting aesthetic values does not constitute a valid exercise of the police power,²⁵⁴ and because

in some instances the enforcement of the new rights to beauty and view would afford protection to interests which were purely aesthetic, cultural or social?²⁵⁵ The answer is that in *People v. Stover*,²⁵⁶ *Matter of Cromwell*²⁵⁷ and *People v. Goodman*²⁵⁸ the New York Court of Appeals has definitely rejected the majority rule, and has made it clear that the New York law now is that any reasonable legislation for the protection of the aesthetic, cultural or social values of the public constitutes a valid exercise of the police power, even though the statute has no other purpose.²⁵⁹ Thus in *Stover* the court said:

"Once it be conceded that aesthetics is a valid subject of legislative concern the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. If zoning restrictions 'which implement a policy of neighborhood amenity' are to be stricken as invalid, it should be, as one commentator has said, not because they seek to promote 'aesthetic objectives' but solely because the restrictions constitute 'unreasonable devices of implementing community policy'...The ordinance before us...imposes no arbitrary or capricious standard of beauty or conformity upon the community. It simply prescribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under the police power (see, e.g., *People v. Rubenfeld*, 254, N.Y. 245...), and we perceive no basis for a different result merely because the sense of sight is involved."²⁶⁰

In *Cromwell* the court, after referring to *Stover* as the leading case, went on to state that the 'notion that esthetic objectives alone will not support a zoning ordinance' has been "discarded."²⁶¹ And in *Goodman*²⁶² the court, after citing *Stover* and *Cromwell* with apparent approval, went on to uphold as a valid police power measure a village ordinance fixing the permissible size of commercial signs although it seemed to have no purpose other than the protection of the appearance and cultural and social patterns of the community.

If the state can constitutionally authorize local governmental units to curtail a landowner's common law freedom to erect structures or to perform other acts on his premises regardless of their effect on the beauty of the prospect from his neighbors' lands or the visibility of that prospect, and if as Stover, Cromwell and Goodman indicate, such a restriction can be imposed for the sole purpose of furthering the public good by the protection of purely aesthetic, cultural and social values, it would seem to follow that the state can, for the same purpose, constitutionally create rights to beauty and view in the owners of the land commanding a prospect of a natural body of water, although the enforcement of such rights would in some cases prevent a landowner from exercising the common law privilege just referred to.²⁶³ The public interest to be served by creating such rights to beauty and view would appear to be the same as that served by legislation authorizing municipal adoption of ordinances for the protection of public aesthetic values. While the recommended revised and expanded version of sec. 15-0701 would not benefit the entire public directly, it would, like the legislation upheld in Stover and Goldman, be in furtherance of the social welfare because providing protection for the aesthetic desires and sensibilities of large numbers of the people of the state.²⁶⁴

If the New York Court of Appeals should have occasion to pass on the enforceability of rights to beauty and view as against a defendant who, after the effective date of the creating legislation, had erected a structure on his land unreasonably impairing the natural beauty of the view of a lake or stream and its setting visible from plaintiff's land, or unreasonably obstructive of such view, and if the court decided, as seems likely in view of Stover, Cromwell and Goodman, that the creation of such new rights constituted a valid exercise of the police power,²⁶⁵ even though the plaintiff could show no harm to any interest other than an aesthetic one, it seems probable that such a decision would be sustained by the United States Supreme Court if the defendant should carry his case to that tribunal. Pertinent in this connection is the fact that the defendant's appeal to the United States Supreme Court in Stover was dismissed for want of a substantial federal question.²⁶⁶

It should be noted, moreover, that the federal courts have for many years exhibited a friendly attitude toward state legislation of the police power type, including statutes modifying interests in water or affording protection to aesthetic values.²⁶⁷ Of this attitude the following quotation from *Berman v. Parker* is demonstrative:

"It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled...If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."²⁶⁸

But could the limited right to beauty apparently created by sec. 15-0701 of the New York Environmental Conservation Law,²⁶⁹ and the expanded right to beauty and the new right to view which would be established by the suggested amendments to that section if they were enacted,²⁷⁰ be enforced against the owner of a structure erected or the doer of an act performed prior to the effective date of the version of the section on which the plaintiff bases his action, or would such enforcement, because of its retroactive effect, involve a violation of the due process clauses?²⁷¹ If before such effective date D had constructed on his premises and within P's view, the owner of a nearby tract overlooking a lake and its environs, an industrial plant of such a kind and operated in such a manner that although it did not violate any of P's common law rights then recognized,²⁷² the effect of the plant was such that P could have successfully maintained an action because of its presence if the expanded right to beauty which the amendments to sec. 15-0701 would be intended to create had been in existence when the plant was built, could P, as soon as the amendments became effective,²⁷³ secure the enforcement against D of the expanded right to beauty, and obtain whatever relief against him as was appropriate under the facts: e.g., an injunction requiring D to remove his plant or to alter it so as to confine its impairment of the beautiful prospect within reasonable limits, or a judgment against D for damages because of the depreciation of the market value of his premises?

At first glance it might appear that if the analogy afforded by the law of zoning were again to be looked upon as controlling,²⁷⁴ this question must be answered in the negative; for there is ample authority for the general proposition that uses of land begun before the enactment of a zoning ordinance prohibiting them may be continued despite such prohibition, if otherwise lawful,²⁷⁵ although the ordinance does not expressly exempt existing nonconforming uses from its scope,²⁷⁶ or even if the ordinance expressly purports to apply to such uses.²⁷⁷ This result is arrived at because of the injustice of compelling a landowner to abandon a nonconforming use or to tear down a nonconforming structure in which he had made a substantial investment prior to the ordinance,²⁷⁸ and by viewing the privilege of continuing an existing nonconforming use or of maintaining an existing nonconforming structure as a vested property right of which the landowner cannot be deprived without due process of law; i.e., without compensation.²⁷⁹ If a municipality, acting under legislation authorizing it to adopt zoning ordinances in furtherance of the public welfare, cannot retroactively make an existing lawful use of land or an existing lawful structure unlawful by adopting an ordinance forbidding them, it would seem to follow that the state cannot accomplish such a change in the legality of a structure or act by creating new rights to beauty and view.

It should be noted, however, that in New York an important limitation has been put on the scope of the zoning law rule protecting nonconforming uses or structures. Speaking in general terms, it now seems to be the New York law that such uses or structures need not be protected when, in view of all the facts and circumstances, protection can reasonably be withheld.²⁸⁰ As in determining when a refusal to protect such a use or structure would be reasonable, the New York courts take into account *inter alia* the size of the non-conformer's investment in his existing use or structure, the practicability of transferring his operation to another site, the loss which would be caused him by a refusal to protect his existing use or structure, and whether the benefit to the public from such refusal would be of "greater moment" than the loss which it would visit upon the non-conformer, the New York Court of Appeals has declined to protect existing

nonconforming uses and structures when the non-conformer's investment was small, his operation was of little social importance, and its situs could practicably be changed.²⁸¹ It would seem to follow by analogy that rights of beauty and view could be enforced against a structure erected prior to the effective date of the statutes creating such rights without violation of the due process clauses whenever such enforcement would be reasonable in view of all the facts and circumstances. However, if the precedents in the zoning field are to control, it would seem that enforcement against an impairment of beauty or obstruction of view could usually be obtained only when the consequent loss to the defendant, though substantial, would not be unreasonably large.²⁸² In sum, assuming the probable acceptance by the courts of the zoning analogy when dealing with attempts to enforce the existing and proposed rights to beauty and view, the fact that the enforcement would cause the defendant loss will operate in his favor to a greater extent if he is being sued because of a structure erected prior to the effective date of the statute creating the rights than it would if he is being sued because of a structure erected or proposed after such date,²⁸³ but the proof of such loss will not always constitute a defense even in cases involving pre-existing structures.

A court would be all the more likely to take a position consistent with the foregoing if, as it probably would, it construed sec. 15-0701 of the Environmental Conservation Law as merely creating a right that beauty should not be unreasonably impaired, rather than an absolute and unconditional right to beauty, and if the section in revised and expanded form expressly so provided with respect to the rights to beauty and view;²⁸⁴ for in determining whether or not the defendant's impairment of natural beauty or obstruction of the plaintiff's view thereof was unreasonable, the court would undoubtedly take into account not only the size of the loss which the defendant would sustain if compelled to alter or remove an unsightly or obstructing structure,²⁸⁵ but also the fact that the impairment or obstruction was brought about before the effective date of the legislation invoked by the plaintiff.²⁸⁶

Resort to the variability principle that what is reasonable and lawful today may become unreasonable and unlawful tomorrow if conditions

change sufficiently - a principle which is a basic element of the riparian doctrine²⁸⁷ - would not necessarily destroy the advantage which would probably be possessed by a defendant whose impairment of riparian beauty or obstruction of the view thereof had been effected prior to the enactment of the legislation creating the plaintiff's aesthetic rights. In applying the variability principle the court must determine whether the defendant's structure, which was originally reasonable, has become unreasonable because of the growing importance of aesthetic desires reflected in the legislation under consideration; but in making this determination the court will almost certainly take into account not only the extent of the loss which a decision adverse to the defendant would cause him,²⁸⁸ but also the fact that he had acted prior to the effective date of the statute relied on by the plaintiff.²⁸⁹ In other words, adherence to the variability principle will not lead in every case in which enforcement of rights to beauty or view is sought against a pre-existing structure to a decision for the plaintiff and consequent infliction of substantial loss on the defendant, because such a structure may, under appropriate circumstances, still be found reasonable and lawful despite the greater relative importance which aesthetic values now enjoy.

In the light of the foregoing considerations it is submitted that the statutory aesthetic rights created by sec. 15-0701 of the Environmental Conservation Law and which would be created by the enactment of the suggested amendments could be enforced even as against a defendant who was charged with nothing more than violations thereof by acts done prior to the effective dates of the statutes creating such rights, provided the loss which would be inflicted on him by such enforcement would be relatively small, and provided further that such retrospective application would not be contrary to the legislative intent.

For several reasons, however, the defendant's position as to such intent would seem to be the more tenable as far as the present version of sec. 15-0701 is concerned. In the first place, it is a general rule of construction that statutes are to be construed as operating retrospectively only whenever they are susceptible of such interpretation;²⁹⁰ and in the second place, it could be argued that the words of this

section are not susceptible of that construction, despite the express provision for retroactivity in the last sentence of subd. (1); for this provision is so worded as to purport to apply only to that subdivision;²⁹¹ because subds. (2) and (3) which play the primary role in the creation of a right to beauty²⁹² not only lack an express provision for retroactivity,²⁹³ but contain language which could be interpreted as indicating a legislative intent that the subdivision should have prospective operation only. For example in the first line of subd. (2) the phrase "shall mean" is employed rather than the word "means." It is to be hoped that if the section is revised and expanded it will contain language removing all doubt as to the extent to which it is intended to have retrospective operation.

Statutes Creating Private Aesthetic Interests in New York Lakes
and Streams Having State-owned Beds as Exercises of the
State's Sovereign Power

Does the Present Version of sec. 15-0701 of the New York Environmental Conservation Law Constitute a Valid Exercise of the State's Sovereign or Reserve Power, or would its Enforcement in Certain Situations Involve a Violation of the Due Process Clauses? If that Section were Amended so as to Purport to Establish not only in Riparian Owners but also in Owners of Land which, although Non-riparian, Commands a View of a Natural Body of Water, a Right that its Beauty and that of its Setting shall not be Impaired or the View thereof from their Lands Obstructed to an Unreasonable Extent by an Alteration in the Body of Water or by any other Act, would the Section Qualify as a Valid Sovereign or Reserve Power Measure, or would its Enforcement in Certain Situations Involve a Violation of the Due Process Clauses?

Since, as previously pointed out,²⁹⁴ the State of New York possesses a sovereign or reserve power over the waters of any lake or stream the bed of which it owns,²⁹⁵ it may without violation of any constitutional provision enact legislation providing for the devotion of such waters to

a public purpose, even though no provision is made for the payment of compensation to the persons whose use or enjoyment of the lake or stream is thereby interfered with.²⁹⁶ It would seem to follow that if the creation of privately enforceable rights to beauty and view are in the public interest, as contended hereinbefore,²⁹⁷ and therefore for a public purpose,²⁹⁸ the State could, by virtue of its sovereign power, create private rights to beauty and view enforceable against any person who after the effective date of the statute creating the rights, performed an act which impaired the beauty of the lake or stream or interfered with its visibility to an unreasonable extent, regardless of whether the legislation creating such rights could be held to be a valid police power measure. Although to date the State seems to have invoked its sovereign power over waters only as against owners of riparian land,²⁹⁹ or holders of statutory grants of water use privileges,³⁰⁰ or owners of the lake or stream bed subject to the sovereign power expressly reserved by New York when conveying land to Massachusetts pursuant to the Treaty of Hartford,³⁰¹ there would appear to be no cogent reason why the State's sovereign power could not be successfully asserted against any person whether landowner or not, and, if a landowner, regardless of whether he is a riparian owner.

Moreover, it would seem that a statute constituting an exercise of the State's sovereign power over the waters within its borders could, without violation of the due process clauses, be enforced retrospectively on the theory that every citizen's rights and privileges with respect to lakes and streams with state-owned beds come to his hand already burdened with and subject to the state's sovereign power. Although there seems to be no New York case in which a court lays down this proposition in express terms, the general tenor of the opinions in the New York cases in which the existence of the sovereign power is affirmed is consistent with this position,³⁰² which, it is important to note, was the one taken by the United States Supreme Court in *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*³⁰³ when it held that the State of Minnesota could authorize the diversion of water from a navigable river for municipal supply without violating the 14th amendment although no provision was made for compensating riparian

owners harmed by the diversion, because all riparian rights in Minnesota navigable streams had been held subject to the state's paramount right from the beginning.³⁰⁴ Analogical support for this conclusion is afforded by the decisions that the federal government and the states, by virtue of their respective powers over navigation, may without giving compensation, halt or interfere with uses of navigable waters already being made, because the privilege of making any use of navigable waters was subject from its inception to the federal or state power to control, protect and further navigation.³⁰⁵

From the standpoint of a plaintiff seeking to enforce sec. 15-0701 either in its present form or after having been expanded in scope by the amendments referred to above, would it be advisable for him, when defending the statute against attack because of the uncompensated taking which its enforcement would involve,³⁰⁶ to rely on the state's sovereign power as well as on its police power in any case in which the lake or stream in litigation was subject to the sovereign power because its bed is state-owned or because the state had reserved its sovereign power when conveying the bed? Although it has been suggested that a state's police power has a reach as broad as its sovereign power because the public interest is the measure of the scope of both powers,³⁰⁷ it is submitted that this question should be answered in the affirmative. In the first place, if retrospective application of the statute is sought, it could more readily be obtained when relying on the sovereign power than when invoking the police power because of the probability pointed out above that the court would hold that the defendant's interest in the lake or stream was already burdened by the state's sovereign power when he acquired it, whereas if retroactive enforcement of a police power measure is sought, the plaintiff may find it difficult to persuade the court that the public interest in the achievement of the statute's goals is so great as to justify the infliction of severe financial loss on the defendant.³⁰⁸ In the second place, while it is true that the public interest plays an important role when the validity of legislation as a police power measure is to be determined, the public interest is not in that instance the sole and decisive factor that it appears to be when the validity of legislation as an exercise of the

state's sovereign power is in issue. As already noted, when deciding whether a particular statute qualifies as a valid exercise of the police power, the public interest is but one of several factors of which the courts customarily take account.³⁰⁹ It should therefore be easier to establish the constitutionality of legislation creating rights to beauty and view in cases in which the sovereign power could be invoked than in cases in which the police power would have to be relied on. The difference in the efficacy of the two powers from the standpoint of one defending the constitutionality of a statute is well illustrated by the public water supply cases. If a lake or stream is subject to a state's sovereign power, it can take or authorize the taking of the water for public supply without provision for compensation to harmed riparians, even though the damage they sustain is great; whereas if the body of water is not of the sort which is subject to the sovereign power,³¹⁰ the state or its nominee must obtain water for public supply by eminent domain; for the uncompensated destruction of riparian rights which such a project would involve would not be a valid exercise of the police power.³¹¹

The True Meaning of the Declarations by the United States Supreme Court
that each State is Free to Change its Water Law as it Sees Fit

In *Connecticut v. Massachusetts* the United State Supreme Court declared that "every state is free to change its law governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise;"³¹² and has made similar statements in several other cases. By those utterances did the Supreme Court mean to assert that a state has a power over privately owned privileges and rights in lakes and streams which is separate and distinct from its police³¹³ and navigation³¹⁴ powers as well as from whatever sovereign power³¹⁵ it may possess over the bodies of water within its borders; a power which would enable it to enforce legislation modifying or even abolishing private interests in natural bodies of water without compensation to the owners of such interests, even though the legislation could not qualify as a valid exercise of the police power, the navigation power, or the sovereign power? Or did the Supreme Court, by

the utterances referred to, intend to point out nothing more than that as far as the federal government's power of control over waters is concerned a state is free to enact legislation adopting either the riparian doctrine of the common law or the prior appropriation doctrine or a water code including elements from both systems, and to modify or abolish any existing water rights which are inconsistent with the provisions of the new legislation; and did not mean to indicate that such state legislation would be valid against the owners of water privileges and rights, even though they were not compensated for the impairment or destruction of their interests, and even though the legislation could not qualify as a valid exercise of either the police power, the navigation power or the sovereign power? While some writers have used language which could conceivably be read as giving an affirmative answer to the first question and a negative answer to the second,³¹⁶ other commentators seems to have taken the opposite position³¹⁷ which, in view of questions actually decided in the cases referred to and of the general tenor of the opinions in those cases, would appear to be the correct one.

Thus although in *United States v. Rio Grande Irrigation Co.* the court, after quoting Kent's version of the riparian doctrine, said:

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise,"³¹⁸

the court's actual holding was that this statement was subject to an important exception: viz., that the state's power is limited by the "superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States;"³¹⁹ and that the federal government was therefore entitled to an injunction restraining the defendant from diverting water from the Rio Grande River to an extent which would interfere with its navigability even though the defendant had obtained a franchise from the Territory

of New Mexico to divert water from that river. The court did not discuss or even refer to the question as to whether private riparian owners on the Rio Grande or private claimants of any sort of interest in the river water could have objected to the diversion. As far as the opinion shows, they had not; possibly because the defendant was claiming no more than the privilege of diverting water which was not being used by someone else. In view of the foregoing, it seems virtually impossible to interpret Rio Grande as recognizing the ability in a state to effect uncompensated impairment or destruction of private water privileges and rights without a demonstration that the impairment or destruction was a valid exercise of either the state's police, navigation or sovereign power, even though the above quoted statement is not qualified by the inclusion of any express disclaimer of such a recognition.³²⁰

The same inference can be drawn with respect to the bearing on the power of a state to effect uncompensated impairments of its citizens' private water privileges and rights from the statement in *Kansas v. Colorado* that a state

"may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."³²¹

The issues resolved in this action to enjoin an upstream state from diverting river water to the damage of citizens of a downstream state were as to the division of power over interstate rivers between the United States Supreme Court and the states through which such rivers flow; and as to whether Colorado had the privilege of inflicting uncompensated harm on Kansas citizens by irrigation diversions, provided they were not so great as to violate the principle of equitable apportionment between states.³²² To the decision of these issues a resolution of the problem as to whether a state has the power to change its water law without compensating those of its own riparian owners as were harmed by the change was unnecessary; and the assumption seems

justified that the court's declaration as to a state's power to change its water law was not intended to bear on that problem.

For substantially similar reasons the same conclusion can be reached as to the purpose of the previously quoted³²³ statement in *Connecticut v. Massachusetts* that

"...every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise."³²⁴

Like *Kansas v. Colorado*, this was an action to enjoin diversion of river water by an upstream state to the prejudice of the citizens of a downstream state. Although *Connecticut* argued that the *Massachusetts* diversion for municipal supply would infringe vested *Connecticut* property rights which could not be taken against the will of their owners without her consent, the Supreme Court, following *Kansas v. Colorado*, held that the principle of equitable apportionment between states applied, and that as the diversion objected to would cause no harm to *Connecticut* citizens under the conditions prevailing at that time, *Connecticut* was not entitled to injunctive relief. The court was, of course, able to reach this result without considering whether *Massachusetts* would be liable to such of her own riparian owners as would be harmed by the diversion, or whether the *Massachusetts* legislation authorizing it was a valid exercise of the police power. It can, therefore, be inferred that the court's declaration that a state had the power to change its water law was not intended to apply to a dispute between *Massachusetts* and her own riparians, but rather to a dispute between *Massachusetts* and the citizens of another state; the exercise of the power to be subject, however, to the principle of equitable apportionment of water between states.³²⁵

Nor can the statement in *California Oregon Power Co. v. Beaver Portland Cement Co.* that

If the language of the Desert Land Act "is to be given its natural meaning...it effected a severance of all waters upon the public domain, not theretofore appropriated, from

the land itself...it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed³²⁶...Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they may deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' Kansas v. Colorado, 206 U.S. 46, 94, the full power of choice must remain with the state."³²⁷

be interpreted as a recognition of a power in a state to make changes in its water law without compensating such of her citizens as are harmed thereby, even though the state's act does not constitute a valid exercise of its police, navigation or sovereign power; for the court's holding that the power company did not have the riparian rights that it claimed was not based on the theory that they had been abolished by the enactment of the Oregon Water Code, but was put rather on the ground that the federal patent under which the power company claimed its land carried with it no common law water rights. In view of this fact it seems reasonable to conclude that the statement of the court quoted above was simply intended as an assurance to the states that the court's holding should not be interpreted as in any way diminishing the existing power of the states as against the federal government to decide for themselves what system of water law should prevail within their borders.

Further support for the above suggested interpretation of the United States Supreme Court's declarations in *Rio Grande, Kansas v. Colorado*, *Connecticut v. Massachusetts*, and *California Oregon Power* in regard to the state's freedom to alter its water laws is afforded by its choice of a basis of decision in *Lindsley v. Carbonic Acid Gas Co.*³²⁸ in which the defendant attacked a New York statute curtailing its common law privileges with respect to withdrawal of gas-charged percolating water on the ground that since the statute failed to provide compensation for those harmed by its enforcement, it deprived the defendant of its property without due process of law in violation of the 14th amendment to the United States Constitution. Now it would seem that if the United States Supreme Court believed that the states had a power to change their water law at will, regardless of the harm thereby caused its citizens, the court, when rejecting defendant's contention, would have based its decision on that power. Its failure to do so and its election to uphold the statute as a valid police power measure indicate quite clearly that the Supreme Court did not recognize in the states an unlimited power as against their citizens to change their water laws without compensating for the harm caused by the changes; and that unless the legislation effecting the change could qualify as a valid exercise of the state's police, navigation or sovereign power, the state could not enforce the statute against one of its citizens harmed by such enforcement without providing for his compensation. It is also worthy of note that the earlier decision of the New York Court of Appeals upholding the constitutionality of the statute was based on the state's police power rather than on the doctrine that a state has the power to alter its water laws at will.³²⁹

And finally explicit support for the view that a state's power to change its water law is, as against its own citizens, no more extensive than its power to alter other laws with respect to private property rights is afforded by the following statements of the court in *Baumann v. Smrha*: viz.,

"The power of a state either to modify or reject the doctrine of riparian rights...has long been settled

by the adjudicated cases. Of course, such modification in the law of the state must recognize valid existing vested rights..."³³⁰

and by the concurring opinion of Justice Stewart in *Hughes v. State of Washington*.³³¹ This was an action in which the plaintiff sought a declaration that she was the owner of land formed by accretion between 1899 and 1966 to a tract in the defendant state bordering on the sea. Mrs. Hughes' predecessor in title had obtained a federal patent to this tract in 1866; and Mrs. Hughes became the owner subsequent to 1889 and apparently later than 1946. When Washington was admitted to statehood in 1889, art. 17 of her constitution asserted her ownership of the beds and shores of all navigable waters up to the line of high tide or high water. In *Ghione v. State of Washington*³³² decided in 1946 the Washington Supreme Court rejected the contention of the state that art. 17 operated to deprive private riparian owners of post-1889 accretions. In the instant case, however, decided in 1966, the state court, distinguishing *Ghione* on the ground that it involved land riparian to a river rather than to the ocean, held that the post-1889 accretions in litigation belonged to the state and not to Mrs. Hughes.³³³

The United States Supreme Court, speaking through Justice Black, reversed this decision, holding that the effect of the federal patent was a federal question; and that although the federal government could, if it so desired, apply a state rather than a federal rule, it should not do so in this case because

"The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land.'"³³⁴

The court went on to hold that under the federal rule the owner of the oceanfront land had a right to the accretions thereto.

Justice Stewart, although concurring in the judgment of reversal, explained in the following language his preference for basing it on other grounds:

"Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual states to develop and administer. And surely Washington or any other state is free to make changes, either legislative or judicial, in its general rules of property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules...For if they were, then the property law of a state like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant."³³⁵

But that Justice Stewart did not conceive the states' power to choose and change their property and water law as unlimited clearly appears from the following statements, made after he had rejected the contention that *Ghione* was distinguishable from the case before the court:

"I can only conclude...that the state court's most recent construction of Article 17 effected an unforeseeable change³³⁶ in Washington property law as expounded by the State Supreme Court. There can be little doubt about the impact of that change upon Mrs. Hughes; the beach she had every reason to regard as hers was declared by the state court to be in the public domain...Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into

public property without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

First Amendment Protection of Freedom of Speech and Religion as a
Limitation on the Enforceability of Sec. 15-0701 of the New York
Environmental Conservation Law as Presently Worded or if Expanded
as Recommended

Suppose that the section is so expanded as to create in owners of land commanding a view of a natural lake or stream and its setting a right that their natural beauty shall not be impaired to an unreasonable extent by anyone;³³⁷ that after the effective date of the Amendment A, the owner of land riparian to a lake, erects on his land in July of an election year a sign 30' by 20' and illuminated at night, extolling the capabilities, integrity and policies of a particular candidate for public office; that A's entire tract and the face of his sign are clearly visible from B's land; that aside from the cottages, boathouses and docks of the riparian owners, all of a style customary in the neighborhood, the sign is the only structure so visible; that B, claiming police power status for expanded sec. 15-0701, and contending that A's sign, by impairing to an unreasonable extent the charm of the prospect visible from B's land, violates the right to beauty created in B by the section, asks a New York court for an injunction directing A to remove his sign; that A, while conceding that the section might be enforceable as a police power measure against a defendant who was using a tract riparian to the lake as an automobile junk yard, contends that the section cannot be enforced against him because his erection and maintenance of his sign constitute an exercise of his right to freedom of speech; that the first amendment to the United States Constitution,³³⁸ made applicable to the states by the 14th,³³⁹ forbids interference with the exercise of this right of free speech by state action;³⁴⁰ and that the issuance of an order by a state court

directing the removal of the sign obviously would constitute state action,³⁴¹ what disposition would the court make of the case?

Under the decisions A's position would appear to be anything but hopeless. Much to his advantage would be the well established view that while freedom of speech is of great importance, freedom of expression of political opinion is of transcendent importance; a priceless freedom absolutely essential to the salvation of the republic.³⁴² He might be aided too by the absence of any real basis for the suspicion that he was trying to coerce rather than to persuade his neighbors; and so was not entitled to first amendment protection.³⁴³ The vulnerability of the defendants in *People v. Stover* to such a suspicion seems to have played a part in leading the court to hold that enforcement of an ordinance prohibiting frontyard clotheslines did not involve an unconstitutional curtailment of the defendants' freedom of speech, although they had testified when prosecuted for violation of the ordinance that their disobedience was intended as a protest against their tax assessment. A rather firm foundation for this interpretation of *Stover* is afforded by the last sentence of the opinion which reads as follows:

"It is obvious that the value of their 'protest' lay not in its message but in its offensiveness."³⁴⁴

A could, of course, argue that his manner of enjoyment of his right to free political speech, though possibly harmful to B, was not unnecessarily so, and was not therefore an unreasonable interference with B's enjoyment of his property. In justification of the size of his sign A could point out that it had to be big enough to accommodate large lettering if its message was to be readable by passing boaters. With respect to its illumination he could say that the men who come to summer cottages usually arrive late in the day, except on weekends, and that much of their boating would be done when failing light made visibility poor. In defense of the sign's location, he could argue that during the summer the owners of the cottages and their families - the women in particular - would spend so large a proportion of their time by the lake that if a political message was to reach them with effective

frequency, it must be exhibited where it would be easily visible during a lakeside day and evening. And as to the timing of the message it could be truly said that in view of the prevailing practices, political advertising in the summer immediately preceding a fall election is by no means premature.

But B could in turn make quite a case for the relief he seeks. While granting the single importance of the right to freedom of speech in regard to political matters, he could point out that it has been held that this right is not absolute, and that after balancing it against the competing interests of the state and of affected private parties, it must be confined within reasonable bounds so that it will not nullify to too great an extent other constitutionally protected rights.³⁴⁵ He can cite the judicial opinions taking the position that when determining the lengths to which a speaker will be protected in going, account should be taken of the effect of his activities on the uses to which the place from which he chooses to speak is normally devoted,³⁴⁶ and contend that the visual enjoyment of natural beauty - one of the principal uses of premises commanding a view of a body of water³⁴⁷ - would be seriously and unreasonably interfered with by A's large sign. He could, moreover, contend that although the existence of alternative opportunities for political expression does not in and of itself constitute a bar to a speaker's resort to the mode and place of expression objected to,³⁴⁸ it has been held that a refusal to allow a speaker to use a means of expression which is definitely harmful to objecting parties is justifiable when less harmful and equally effective alternatives are available;³⁴⁹ and that A's candidate can be sufficiently well advertised by signs maintained in those areas in which the citizens spend most of their time.

B could also point out that A, by interfering with B's enjoyment of his premises to an unreasonable extent, has been guilty of violating B's constitutionally protected property right to freedom from nuisance;³⁵⁰ and that it has been consistently maintained that the right to freedom of speech does not excuse the speaker from liability for trespass.³⁵¹ B could then argue that even though the land owner's right to freedom from trespass may be of more importance to him than his right to freedom from

nuisance,³⁵² the latter right is nevertheless of so much value to him that the right to freedom of speech should not be allowed to excuse the speaker from liability for his creation of a nuisance³⁵³ any more than it would excuse him from liability for commission of a trespass; and that since a speaker who has been guilty of nuisance has by unreasonable action interfered with another's enjoyment of his land, the court should and constitutionally can require the speaker to deliver his message in a more reasonable way.

And finally B could cite three holdings and four dicta, all recent, that reasonable restrictions on the nature and size of political advertisements imposed by a legislative body in the interests of aesthetics do not constitute violations of the first amendment right to free speech; and B could argue that these authorities would afford strong analogical support for the assumption that such restrictions, insofar as they were reasonable, would be held constitutionally valid if imposed by the New York courts pursuant to the authority which an expanded version of sec. 15-0701 would undoubtedly purport to have given them when creating a right in the owner of land commanding a view of a lake or stream that the beauty of the prospect from his land should not be impaired to an unreasonable extent.

The earliest of the three holdings just referred to is the well known case of *People v. Stover* in which the defendants' conviction for violating an ordinance forbidding the stringing of clothesline in the front yard of residential property was affirmed despite the defendants' assertion that they had put up the clothesline as a protest against what they believed to be an unfairly high tax assessment levied on their property,³⁵⁴ and despite their contention that the ordinance, as applied to them, was unconstitutional as an interference with free speech. In rejecting this claim the court said *inter alia*:

"Having concluded that the ordinance here in question is validly grounded on a proper exercise of the police power,³⁵⁵ we turn to the defendants' principal contention, that it is invalid as applied to them because it constitutes an

an unconstitutional infringement of their freedom of speech. The defendants erected six clotheslines on their property as a protest against their tax assessment. This form of nonverbal expression is, we shall assume, a form of speech within the meaning of the First Amendment...However, it is perfectly clear that, since these rights are neither absolute nor unlimited..., they are subject to such reasonable regulation as is provided by the ordinance before us."³⁵⁶

Another recent case holding that reasonable restrictions on the nature and size of political advertisements imposed by a legislative body in the interests of aesthetics do not constitute violations of the first amendment right to freedom of speech, and which therefore gives analogical support to the assumption that reasonable restrictions imposed by a court pursuant to sec. 15-0701 after expansion as recommended would be held constitutionally valid by the New York courts is *Matter of Gibbons v. O'Reilly* in which the petitioner sought a judgment prohibiting the respondent, and official of the Village of Larchmont, from preventing the maintenance by the petitioner of a sign 22' by 8' advocating the election of Senator Goldwater to the presidency and located in a vacant lot in a single-family residential area. After finding that the sign violated the village ordinance, the court, as requested in respondent's counterclaim, enjoined the petitioner from further violation of the ordinance. In support of its conclusion the court said inter alia:

"...this very ordinance has already been upheld with respect to the validity of its adoption, the power of the village to enact it, and its constitutionality as an exercise of the police power (Village of Larchmont v. Sutton, 30 Misc 2d 245). The ordinance was upheld again in Village of Larchmont v. Levine, (225 N.Y.S. 2d 452). It is doubtful, however, that either of these decisions contemplated the precise constitutional question presented here, namely, that the prohibition of a political advertisement in the form of a sign or billboard is

an infringement on the right of free speech and therefore violates the First Amendment to the Federal Constitution... The petitioner has been forbidden to maintain a sign in a specific location, which happens to be a single-family residential district, and the only question presented here is whether the village may properly exclude a political billboard from such a district without infringing upon the constitutional right of free speech. The court is not called upon to say whether the exclusion of such a display from a business or industrial district would be a justifiable exercise of power. The question is different when considered in connection with a residential area, as is apparent from the whole theory and history of zoning. It appears to the court that the sign ordinance is a valid enactment as to residential districts, even though it may limit to some degree the right to freedom of speech. If the guarantee of the First Amendment can be used to justify the erection of signs and billboards of unlimited size in an area restricted to one-family homes, then it would seem that zoning is a mere delusion. It is now quite definitely settled in this State that aesthetic considerations are a valid subject of legislative concern (People v. Stover, 12 N.Y. 2d 462)...The court is aware of the fact that political activity is a necessary part of the democratic process, and that a good deal of latitude must be allowed to those campaigning for public office even though some public inconvenience may result...But it is plain from the Stover case (*supra*),... that the right of free speech is not an unlimited license and that it may be restricted by reasonable regulations enacted for the promotion of the public welfare."³⁵⁷

Citable along with Stover and Gibbons in support of the constitutional validity of reasonable restrictions on political advertising imposed in

the interests of aesthetics is the very recent case of *Ross v. Goshi*³⁵⁸ decided by the United States District Court for the District of Hawaii. In this case the court held that while an ordinance enacted to abate traffic and fire hazards and to preserve the natural beauty of a county, and which banned all political campaign signs at all times, was unconstitutional as an infringement of the first amendment free speech right of the political candidates, and was a violation of the equal protection clause of the 14th amendment in view of the county's failure to adduce adequate reasons for allowing the maintenance of advertising signs other than political,³⁵⁹ the court went on to hold that an ordinance which subjected all outdoor signs in the county to certain restrictions, but exempted all political campaign signs not exceeding 18 square feet of display surface from compliance with the ordinance for 60 days preceding and 10 days following an election did not unreasonably restrict the candidates in their exercise of their first amendment right to freedom of speech, because the ordinance accomplished "a proper balancing of the conflicting interests involved."³⁶⁰

The first issue on which a New York court would have to pass if it should be confronted with the hypothetical case under consideration would be as to whether A's sign had in fact impaired the beauty of B's prospect. This issue would probably be resolved in favor of B; for the court would almost certainly share the feeling of most people that A's sign constituted a crude defacement of nature's established pattern of beauty for the area.³⁶¹

But what would be the court's next step? Would it, before dealing with the first amendment problem, take time to consider whether A's sign had impaired B's prospect to an unreasonable extent and therefore amounted to a nuisance; or would it bypass that question and explore the issue as to whether under all the facts and circumstances, including the interest of A in free political expression, the interest of B in his beautiful prospect, and the governmental concern with the interests of both parties, some restriction ought to be imposed on the means to which A could be allowed to resort to express his political views? The second alternative would seem preferable and therefore the one likely

to be chosen. In the first place, if both the nuisance and the first amendment questions are dealt with, an undesirable duplication of effort would be likely to occur. Most of the facts and circumstances in the case would be relevant both to the nuisance question and to the first amendment problem, and so would have to be twice referred to and weighed. Thus, for example, both in nuisance and first amendment cases the courts are accustomed to take into account the relative suitability of the activities of the parties to their situs;³⁶² the harm which each party would suffer if his claim were rejected;³⁶³ whether it would be practicable for either party to do anything which would reduce the harm his activity was causing the other;³⁶⁴ and the relative importance to the public of the respective activities of the litigants.³⁶⁵ Moreover, in the hypothetical case, if the nuisance question were dealt with prior to consideration of the first amendment question, and if the court found that A would be guilty of nuisance even if he substituted a smaller sign for the large one, but decided after passing on the first amendment problem that while A would have to remove his large sign, it would be alright for him to erect a smaller one in its stead, the court would have to abandon its answer to the nuisance question lest it find itself in the indefensible position of holding that while A could not be enjoined from erecting a smaller sign, A would be liable to B in damages for any harm he caused B by exercising his first amendment right to free speech by the maintenance of the smaller sign.³⁶⁶

Assuming then that a New York court would not discuss the nuisance problem or perhaps not even mention it, and, after finding an impairment of beauty, would proceed at once to the balancing of competing interests normally resorted to when dealing with first amendment problems, at what result would the court arrive? In view of the holdings and dicta in the six cases cited, three of which expound views of the New York courts,³⁶⁷ it seems likely that the court's answer would be that while the first amendment would not protect A's maintenance of the large sign, it would enable him to exhibit a smaller one during the remainder of the election campaign. Such a decision would seem to be well supported

by the following considerations. Prior to the construction of A's sign the lake and its immediate environs had been exclusively devoted to recreational uses. Other areas more suitable for political advertising were available in communities frequented by the cottagers.³⁶⁸ B could truthfully assert that the state and the public had an interest in the satisfaction of his aesthetic desires as well as in the protection of A's right to freedom of speech.³⁶⁹ If one large political sign were held to be lawful, other landowners would be emboldened to erect such signs with consequent depreciation in the market value of many of the riparian and nearby tracts.

Countervailing considerations tending toward the conclusion that A should be allowed, even in a purely recreational area, to maintain a political sign, provided it were of reasonable size, would include the fact that A's right to free political expression is so essential to the national welfare³⁷⁰ that it should never be completely subordinated in any situation unless the interest held to be dominant has greater importance than that possessed by a right protecting the beauty of a prospect from land commanding a view of a body of water.³⁷¹ Also operating in A's favor would be the probability that the presence of a 6' by 3' sign during the period of a political campaign would not too seriously curtail B's enjoyment of his view of the lake.

If A, the owner of a tract of land riparian to a lake classified as non-navigable and having a bed in private ownership, should begin to tow up and down the lake a scow carrying a large and flamboyant political sign, and should claim the privilege of continuing to do so several times a day during the remainder of a political campaign, and if the other riparian owners each of whom, as normally would be the case with such a lake, owned part of its bed, should seek an injunction restraining him from doing so, they would be able to secure it without any demonstration that the beauty of their view of the lake would be impaired to an unreasonable extent unless the court should decide to depart from what appears to be the New York rule: viz., that it is a trespass for any riparian owner to intrude with his boat on any part of a non-navigable body of water covering land owned by others without

their consent.³⁷² Although it has been held in several states that it is lawful for any riparian owner to boat in water lying over parts of its bed which are in the private ownership of others, even though the body of water is non-navigable,³⁷³ the New York courts have thus far given no hint that they are considering the possibility of adopting such a rule.³⁷⁴ Under these circumstances it seems likely that A's activity would be held to involve numerous trespasses, and that they would be enjoined since, as already pointed out, the courts have consistently maintained the position that the first amendment right to free speech does not extend so far as to shield from liability a person who enters on the land of another against the will of the other, and with no excuse other than a strong desire to express his ideas to the owner of the land intruded upon.³⁷⁵

If, however, the lake on which the sign is towed is navigable, the question would be presented as to whether A's display of political advertising came within the scope of the privilege of navigation which the public has in navigable water even though its bed is privately owned.³⁷⁶ In support of an affirmative answer to this question it can be argued that since it is well established that public streets and highways are specially appropriate places for the exercise of the first amendment right to the free expression of political and other opinions,³⁷⁷ even when the underlying fee of the street or highway is in private ownership;³⁷⁸ since the question as to whether the transportation and exhibition of political signs through the streets or on the highways constitutes an abuse of this privilege has apparently never been answered in the negative by any court or even raised by a litigant; and since it has been said that navigable waters are common highways which people may use as they use other highways,³⁷⁹ A should be held to have the privilege of towing a political sign along the lake, even though by so doing he impairs the natural beauty of the scene within B's vision.

B could, of course, argue in reply that the use of navigable lakes and streams as sites for the exercise of first amendment freedoms has

not been as customary and frequent as has the use of public streets and highways for that purpose, and that there appears to be no judicial decision or dictum clearly indicating that water highways can be equated to land highways for first amendment purposes. B could, moreover, point out that the right to free speech on the public streets and highways from which A seeks to draw analogical support for the privilege of using navigable water as a platform from which to express his views, is not an absolute privilege, but has been confined within reasonable limits; as in *Kovacs v. Cooper* in which the court upheld a city ordinance forbidding talking on the streets through a loud speaker in a loud and raucous tone. In arriving at this conclusion the court said *inter alia*:

"The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."³⁸⁰

In short, B would be in a position to urge that even if the court held that the towing of a political sign over navigable water was in general within the scope of the public's navigation privilege, it could nevertheless enjoin A from using such means to express his views if, after balancing the interests of the private parties and the interests of the state in the protection of those private interests,³⁸¹ it concluded that A's behavior amounted to an unreasonable use of the navigation privilege in view of all the facts and circumstances.³⁸²

If the court, as seems likely, would concede that B was entitled to have the reasonableness issue decided by a balancing of the interests, A could argue that his activity was reasonable because his sign was no larger than was necessary under the circumstances;³⁸³ that although he could deliver his message in other places,³⁸⁴ he was entitled to use this one, particularly since the impairment of beauty he was causing was of short duration when it did occur, and there was a considerable time lapse between occurrences, which would cease altogether at the end of the election campaign. B, on the other hand, could argue that even

if the harm caused by A's activity were small, other persons could successfully claim the privilege of engaging in similar enterprises if he were allowed to continue his sign towing, and that the consequent harm to B would then undoubtedly be great.³⁸⁵ B could also stress the availability to A of other places for the effective delivery of his message with less harm to others because such places were not so extensively used for aesthetic enjoyment.³⁸⁶

While the outcome of B's suit can, of course, only be guessed at, it is conceivable that the court might require A to reduce the size of his sign if it were overly large, and to tone down its colors if they were unduly garnished. The decree might also limit A to a specified number of trips a day, and provide that if other persons should begin the same activity, A would have to share with the newcomers the number of trips which had been allotted to him in such a way that no participant would be allowed more trips than another, and that the total number of trips permitted would not exceed that which the decree had allotted to A. Such a decision, while recognizing the importance to A and to the state of his privilege of political expression in public places, would confine within reasonable limits the harmful impact on others of its exercise.

If in the sign towing case it appeared that the title to the bed of the lake was in public rather than in private hands,³⁸⁷ A's position against B would clearly be stronger in one respect; for even if the court was of the opinion that A's towing of the sign was beyond the scope of the navigation privilege, B would have no basis for an action against A for trespass. Nevertheless, B would still be able to argue that A was vulnerable to the charge that he had impaired the beauty of B's prospect to an extent which was unreasonable in view of the nature of the locus in quo and of the existence of less harmful but effective ways of publicizing his views. It would not be surprising, however, if the restrictions imposed on A by the court in this situation would be less severe than those to which it would subject him if the bed under the navigable water were privately owned.

Would the first amendment be any more helpful to A in the hypothetical cases just considered if the sign which he erected on his

land or towed up and down the lake carried a religious instead of a political message? It could be argued that an intent to give greater protection to the freedom of religious utterance than to the freedom to express political or other opinions is shown by the fact that the exercise of religion, in which the expression of religious views and efforts to win converts are included,³⁸⁸ is the only subject matter of speech to which explicit reference is made in the first amendment.³⁸⁹ The courts have not, however, given freedom of religious utterance sole possession of the first rank in the hierarchy of first amendment freedoms. Thus the United States Supreme Court has said:

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme... All are interwoven together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life."³⁹⁰

Moreover, in many cases the right to freedom of religious utterance, like the right to freedom of political or other expression,³⁹¹ has been held to be non-absolute³⁹² and constitutionally subjectable to reasonable regulation³⁹³ for the protection of the interests of the state.

Thus it was held in *Cox v. New Hampshire*³⁹⁴ that protection of the public interest in assuring the safety and convenience of the people in the use of the streets enabled a city ordinance to repulse an attack upon it on first amendment grounds, even though the effect of the

ordinance was to forbid persons from carrying religious signs through the streets in parade formation without a permit.³⁹⁵ Moreover, in *Prince v. Massachusetts*³⁹⁶ the constitutional power of a state to protect the public interest in the healthy well-rounded growth of young people into full maturity as citizens was recognized by the holding that a state statute forbidding the furnishing of a girl under 18 with printed matter for distribution in the public streets could be constitutionally applied even in a case in which it appeared that the pamphlets furnished were religious in nature and that both the defendant who furnished them and the nine year old girl who distributed them believed they were performing a religious duty in violating the statute; and despite the court's awareness that its decision did in fact interfere with the free exercise of religion.³⁹⁷ Again, in *Appeal of the Trustees of the Congregation of Jehovah's Witnesses*³⁹⁸ the enforcement against a church of an offstreet parking requirement, imposed in the interest of public safety and with which the church could comply without particular hardship, was upheld despite a first amendment plea. Further examples of the curtailment of the right to the free exercise of religion in order to protect an interest of the government are afforded by *United States v. Kissinger*³⁹⁹ in which the defendant's belief that it would be contrary to his religion to comply with a federal regulation against the marketing of certain grain was subordinated to the governmental interest in the maintenance of a sound economic order; and by *People v. Woodruff*⁴⁰⁰ in which a witness was not excused from testifying in a criminal prosecution by her belief that it would be a violation of her religious principles to do so.

Curtailment or regulation of the first amendment right to the free exercise of religion is, however, somewhat more difficult to obtain - at least if the attempt is made by legislation - when the interest sought to be protected by such curtailment or regulation is primarily private rather than public; an interest in regard to which the state can establish no concern beyond that which it has for the protection of the private property rights of all its citizens. Thus while the individual landowner's right to freedom from intrusion will

be protected to a reasonable degree against persons seeking to exercise their religion by the utterance or delivery of religious messages,⁴⁰¹ it was held in *Matter of Westchester Reform Temple v. Brown*⁴⁰² in conformity with the earlier decision in *Matter of the Diocese of Rochester v. Planning Board of Town of Brighton*,⁴⁰³ that enforcement of a zoning ordinance against a religious body could not be justified on the ground that otherwise the property owners in the vicinity would suffer harm because of an impairment of the beauty of the neighborhood and a decrease in property values; it appears that compliance with the ordinance would increase the cost of the defendant's expansion project by \$100,000. The opinion in *Westchester* seems to indicate, however, that the result would be different in a case in which it was apparent that the defendant could comply with the ordinance at relatively small inconvenience and expense.⁴⁰⁴

It is also worthy of note that there is authority for the proposition that enforcement of a provision in a deed prohibiting the erection of a religious structure on the land conveyed does not constitute a violation of the first amendment right to the free exercise of religion,⁴⁰⁵ although it is obvious that judicial enforcement of such a restriction would amount to state action,⁴⁰⁶ and although the religious provisions in the first amendment are, because of the 14th amendment, as binding on the states as the rest of the first amendment.⁴⁰⁷

In the light of the cases above referred to relevant to the achievement of a satisfactory adjustment between the first amendment guaranty of the free exercise of religion on the one hand, and state interest in other areas and private property rights on the other hand, it would not appear to be specially difficult to answer the previously posed question as to whether the first amendment would be any more helpful to A in the hypothetical cases but if the sign on his land or mounted on his scow bore a religious instead of a political message. The United States Supreme Court having made it clear that while freedom of conscience and freedom of mind are each entitled to extensive protection, neither should be ranked above the other in importance, and that each is subject to such reasonable regulation and curtailment as is necessary for the reasonable protection of other interests, public or private, it would seem

safe to predict that the position of neither A nor B in the sign cases would be substantially affected either favorably or adversely if A's messages were religious rather than political.

But if A sold his land to a religious body, which proposed to erect a church on it of a size, style and location which would impair the beauty of B's prospect, or to obstruct his view thereof, and B sought to prevent the erection of the proposed structure, the court's reaction cannot confidently be predicted in view of the results thus far reached in cases in which church buildings have been involved. For B it could be argued that since enforcement of an amended and expanded sec. 15-0701⁴⁰⁸ of the New York Environmental Conservation Law would be for the protection of interests which are primarily private in the sense that the state has no other motives for protecting them than it has for the protection of all private property rights and privileges,⁴⁰⁹ and since in New York in *Evangelical Lutheran Church v. Sahlem*⁴¹⁰ a restriction against church structures contained in a deed of land was enforced for the protection of interests which were private in the sense in which B's would be, and since that case seems never to have been questioned subsequently on first amendment grounds,⁴¹¹ B should be awarded relief.

On the other hand, the religious body could insist that for several reasons *Sahlem* should not be allowed to control: (a) because the first amendment point was overlooked rather than passed on in that case; (b) because even if that issue had been decided in *Sahlem*, the case is not in point since it involved a privately imposed restriction, whereas the one which B would be seeking to enforce would have been created by legislation; and (c) because even if *Sahlem* be treated as in point on the ground that a distinction cannot be justified in this field between restraints imposed by legislation and those imposed by private contract, because enforcement of the contract would involve state action,⁴¹² *Sahlem* was necessarily overruled by *Westchester*,⁴¹³ even though no reference was made to *Sahlem* in the *Westchester* opinion, because it was held in the latter case that the private interests in the preservation of beauty and property values of a neighborhood were not sufficient to justify enforcement of a restrictive ordinance against a religious body, when it appeared

that compliance would cost it \$100,000. The religious body, when defending against B's suit, could then proceed to show that the cost of a building which B would be willing to accept as a tolerable alteration of the natural beauty of his prospect would be prohibitive; and could argue further that although it could expect attendance at its lakeside church only in the summer, it was not unreasonable for it to seek to provide a place of worship at which people could conveniently be present during that season, even if it lay virtually idle during the other three seasons. Though as indicated above, the outcome of B's action would be speculative, it seems reasonable to conclude that the church's chances of success in New York would be somewhat better than his. It is one thing to regulate the location, manner and timing of the delivery of religious messages by individuals, but it is quite another to regulate the size, style and location of a religious structure of the permanent type which can be erected only at great cost. The judicial partiality for the church-building type of religious activity which is exhibited when the competing interest is primarily private rather than public in the sense indicated above, and when the restraint on religious expression is attempted by legislation rather than by private contract, could reasonably be expected to enable the church to defeat B.

Personal Liberties Protected by the Fifth, Ninth and Fourteenth Amendments
as Limitations on the Enforceability of Sec. 15-0701 of the
New York Environmental Conservation Law as Presently Worded
or if Expanded as Recommended

Suppose that A plans to erect on his riparian tract a structure which, although intended for use as a summer cottage, is to be shaped like an ice cream cone and painted with broad stripes of purple, green, orange, blue and pink;⁴¹⁴ that this structure will be within the sight of B, the owner of land commanding a view of the lake to which A's tract is riparian; and that the New York Legislature had enacted the revised version of sec. 15-0701 hereinbefore recommended and forbidding acts unreasonably impairing the beauty of a natural body of water and

its setting,⁴¹⁵ would a New York court grant B an injunction restraining A from carrying out his project? The considerations which would be involved if A argued that the section was unconstitutional because it purported to deprive landowners without compensation of their common law privilege to erect such structures on their land as they pleased even though their neighbors were justified in calling them unsightly,⁴¹⁶ and that the section could not be upheld as a valid police power measure because it served private rather than public interests, have already been noted and discussed.⁴¹⁷ Moreover, attention has been given above to the arguments which the contesting parties could make if A based his defense on the first amendment right to freedom of speech,⁴¹⁸ as he would be able to do if he could persuade the court that his proposed structure would constitute symbolic speech, because intended to convey and because capable of conveying a message.⁴¹⁹

If A, however, instead of relying on the common law privileges of a landowner with respect to construction on his land, or on the first amendment right to freedom of speech, should contend that one of the rights, liberties or freedoms protected by the provision in sec. 1 of the 14th amendment to the United States Constitution that:

"No State...shall...deprive any person of...liberty...
without due process of law."⁴²⁰

and by the 9th amendment which reads:

"The enumeration in the Constitution, of certain rights,
shall not be construed to deny or disparage others
retained by the people,"

is the right, liberty or freedom to express his individuality and aesthetic tastes by having the structures on his land of whatever shape or color he prefers, could A reasonably hope to escape injunctive restraint?

It has been said that although we usually think in terms of the interests explicitly protected by the Bill of Rights, such as freedom of speech and free exercise of religion, "almost any imaginable human interest may be protected from inhibitory legislation" by resort to the

concept of substantive due process.⁴²¹ Considerable justification for this sweeping assertion is afforded by the holdings that by virtue of the 5th and 14th amendments and/or the 9th, there are constitutional rights, liberties or freedoms as diverse as the freedom to enter into contracts,⁴²² the freedom to marry,⁴²³ the right that marital privacy shall not be invaded by legislation prohibiting the use of contraceptives,⁴²⁴ the liberty of travel from state to state or abroad,⁴²⁵ the freedom to direct the education of one's children,⁴²⁶ and the right to wear one's beard or hair in whatever style one chooses.⁴²⁷ Of these six examples it is the last which would seem most likely to afford analogical support for A's claim to a personal liberty to build his lakeside home in the shape of an ice cream cone and to clothe it in a coat of many colors. Consistent with this view is the suggestion that the erection of an odd structure may be an important method of expressing individuality,⁴²⁸ at least as significant as deciding to wear one's hair long;⁴²⁹ a decision which has been said to fulfill this function.⁴³⁰

The existence of such analogical support for A's claim to a freedom of architectural design would be important to him, because there appears to be no authoritative judicial pronouncement expressly recognizing or expressly denying the existence of the constitutionally created liberty which it is assumed at this point that he is asserting. True it is that Judge Van Voorhis, when dissenting from the holding in *People v. Stover* that an ordinance forbidding the stringing of clotheslines in front yards of dwellings was a valid exercise of the police power and did not violate the first amendment, took the position that a person has a constitutional right to be different in matters of aesthetics and taste; but it should be noted that even he failed to give explicit support to the one of A's claims now under consideration; for he did not indicate whether the right of which he spoke was based on the personal liberty provisions of the 5th and 14th amendments, or on the language in them which protects private common law property interests as distinguished from personal liberties.⁴³¹ Moreover, while the omission from the prevailing opinion in *Stover* of all reference to the

9th and 14th amendments⁴³² affords some basis for the inference that the court did not believe that the defendant had a constitutionally created liberty to string clotheslines in his front yard or to populate his premises with structures simulating the ice cream cone, such an inference, because based on silence, can scarcely be regarded as conclusive. Again, although the statement by the Court of Appeals in *People v. Goodman* that "not every artistic conformity or nonconformity is within the regulatory ambit of the police power,"⁴³³ probably should be taken as a warning that some at least of the conceivable acts of self expression in the architectural field cannot be forbidden - in other words, that there exists a freedom of self expression in the design of structures which cannot constitutionally be done away with altogether - this declaration is too general in tenor to provide a certain answer to the question as to what the position of the Court of Appeals would be should it ever be faced with a litigant claiming such a freedom.

In the absence of an express affirmation as well as of a clear denial of A's possession of a constitutional personal liberty to design his summer cottage as he pleases and to decorate it with whatever colors suit his fancy, the question as to whether A could derive from the beard and hairstyle decisions analogical support for his claim to a constitutionally created architectural liberty deserves careful consideration. Fortunately for A the existence of the beard and hairstyle liberty seems to be clearly established. The number of cases affirming its existence is large.⁴³⁴ While protection for it has often been refused, that action, when taken, is usually based on the ground that since constitutionally created personal liberties are not absolute, the beard and hairstyle liberty, like the others, can and should be curtailed under appropriate circumstances: viz., when it appears that countervailing interests of the public or of some unit or agency of government outweigh it. As far as the author is aware, in only one case has the refusal to protect this liberty been expressly based on the conclusion that no such liberty exists.⁴³⁵ The lack of support for

this view may well be due to the courts' awareness of the conceivable though remote possibility that they might in the future be faced with some ridiculous, capricious and tyrannical statute - e.g., one providing that no male should shave his head less than once a week - and might find it difficult to declare such undesirable legislation invalid if no freedom of hairstyle existed.⁴³⁶

Typical of the prevailing approach to the hairstyle problem is that taken in the leading case of *Ferrell v. Dallas Independent School District* in which the circuit court, while referring with approval to a district court decision that a regulation promulgated solely because the school administrators thoroughly disliked what they considered to be exotic hairstyles failed to pass constitutional muster, went on to hold in the case before it that the rule against wearing of long hair by male high school students was valid because of the paramount interest of the state in maintaining an effective school system; and that whatever hindered such maintenance, as the long hair styles had done, must be circumscribed as needed, even when the thing circumscribed is a constitutionally protected right.⁴³⁷

But even though it clearly appears that a constitutionally created freedom of hairstyle does exist, certain questions remain. Does that freedom sufficiently resemble the constitutionally created freedom of self expression through architectural design, which it is assumed at this point that A is claiming, to justify the courts in taking the position that the existence of the former affords analogical support for recognition of the latter? Is it likely that the courts will actually hold that the architectural design freedom is another one of those created by the 5th, 9th and 14th amendments? It is submitted that both of these questions can be answered in the affirmative.

Although the architectural freedom claimed by A is obviously not so thoroughly a personal one as is the freedom of hairstyle, it nevertheless has a markedly personal character. A might be quite as unhappy over his inability to express himself through the ice cream cone style of construction as he would be if not allowed self expression

through the length of his hair or the wearing of a beard.⁴³⁸ And it seems rather probable that the courts would recognize A's claimed freedom of architectural design as another product of the 5th, 9th and 14th amendments; particularly since, as previously pointed out, the already recognized constitutional personal freedoms and liberties are subject to reasonable restriction when a balancing against competing interests shows need for such restriction,⁴³⁹ and since there would therefore be ample precedent for holding that the newly recognized personal freedom of architectural design was not absolute.

The result which could be expected if A's freedom of architectural expression were weighed against the aesthetic desires of B and others similarly situated,⁴⁴⁰ and against the interest of the state in the satisfaction of those desires⁴⁴¹ would, of course, vary from case to case, depending on all of the relevant facts revealed by the evidence; for it seems quite unlikely that the court would take the position that in every conflict of the sort under consideration the victory would always be won by A or that it would always be gained by B.

Nevertheless, in a case in which no more facts were brought out than in the one assumed to have arisen between A and B,⁴⁴² it would seem that the court should and would hold in favor of B. A could, of course, point out that in those instances in which the courts have decided to curtail the hairstyle freedom, the successfully competing interests have been of the greatest importance, such as the state's interest in the successful operation of the public schools⁴⁴³ or in the maintenance of discipline in the armed forces,⁴⁴⁴ whereas the interest which B seeks to protect, and which he argues the state has an interest in protecting, is merely an aesthetic one; that there is judicial authority for the proposition that the hairstyle freedom cannot constitutionally be curtailed if the only reason for such action is to cater to the visual sensibilities of those who find some of the current male coiffures offensive to the eye,⁴⁴⁵ and contend that B's rights with respect to structures which he finds offensive should be no greater.

B, however, has available to him arguments of considerable cogency. Thus he could insist that A's freedom of architectural design is of far less importance to him than his freedom of hairstyle⁴⁴⁶ because, although both freedoms afford opportunity for personal expression, if A's hairstyle freedom is curtailed, his control over his physical person, to which control the law attaches the greatest importance,⁴⁴⁷ would not be complete, whereas no consequence of equal gravity would ensue were his architectural freedom to be restricted. B could next argue that since A's freedom of architectural design is of less importance than his hairstyle freedom, it should be constitutionally curtailable in favor of competing interests which are not large enough to justify a curtailment of the hairstyle freedom; and especially when a failure to protect B's competing aesthetic interest would involve a decrease in the value of his land which might well endure for so long as A persisted in maintaining the structure complained of. B could, moreover, argue that since A must have realized that his chosen form of self expression would in the opinion of most people constitute a greater impairment of the existing natural beauty of the lake and its environs than would the more conventional type of structure which B and his neighbors had erected or would erect in the future, and that since A could find other sites on which to express his architectural taste, B's aesthetic interest and that of the state in protecting it outweigh A's freedom of architectural design. The balance in favor of B would, of course, be greater if he could persuade neighboring owners not only to testify that A's proposed structure would in their judgment materially impair the beauty of the prospect which they and B were enjoying, but also to join B as plaintiffs in the suit for an injunction.

If facts other than the few hypothesized appeared, B's advantages could be increased or wiped out altogether, depending on the nature of the added facts.⁴⁴⁸ Thus should the evidence show that B and his neighbors were substantially impairing the natural beauty of the setting of the lake or stream by the maintenance on their lands of dilapidated structures and by the activities in which they were engaging thereon in public view, a court might deny the injunction on the ground that the

impairment of beauty which would be caused by A's proposed structure would not be unreasonable in view of the impairment of beauty of which B and others had already been guilty.⁴⁴⁹

The Equal Protection of the Law Guaranteed by the Fourteenth
Amendment as a Limitation on the Enforceability of
Sec. 15-0701 of the New York Environmental
Conservation Law if Expanded as Recommended

If sec. 15-0701 were revised and expanded as hereinbefore suggested,⁴⁵⁰ would it violate the clause of sec. 1 of the 14th amendment to the United States constitution which reads: "nor shall any State...deny to any person within its jurisdiction the equal protection of the law?"⁴⁵¹ In support of an affirmative answer to this question⁴⁵² it could be truthfully pointed out that under the expanded section owners of land riparian to a natural body of water or of land lying between such a body of water and a tract commanding a view of it, would be less free to use their land as they saw fit than owners of land not falling in either of the two classes referred to.⁴⁵³ It does not follow, however, that such discrimination would necessarily involve a denial of equal protection of the law within the meaning of the 14th amendment.

The courts are agreed that because of the infinite variety of situations with which the law must deal, it would be utterly impracticable to interpret the equal protection clause as requiring that each person be subject to the same law, and that legislatures therefore must be free to impose special burdens upon or to grant special benefits to various groups or classes of individuals. The courts, insist, however, that a classification cannot be valid unless it is reasonable; and have decided that to be reasonable a classification must include all persons who are similarly situated with respect to the purpose of the law.⁴⁵⁴

In view of these well established principles it seems likely that if the recommended legislation were enacted it would be held that its enforcement would not violate the equal protection clause of the 14th amendment or the corresponding provision in the New York Constitution. The purpose of such legislation would be to give reasonable protection

to the aesthetic desires of persons owning land riparian to or commanding a view of a natural body of water.⁴⁵⁵ To accomplish that purpose it is, of course, necessary to restrict to a reasonable extent the activities in which the owners of neighboring land can engage upon it. On the other hand, it is obvious that the statute's purpose can be accomplished without imposing any restrictions whatever on the activities of landowners whose properties are so located that what they do or construct on them can have no adverse effect on the beauty or visibility of the prospects which persons owning land riparian to or commanding a view of a natural body of water wish to enjoy, and whose desires it is the object of the statute to protect. Consequently to create a class of persons owning land so located that what takes place upon it is of importance to those persons to be protected by the statute and to burden the landowners in that class with restrictions not imposed on landowners in general is valid, even though the landowners in the class are being discriminated against, because the class includes all persons similarly situated with respect to the purpose of the statute and treats all persons in the class alike.

Prominent among the cases tending to justify the prediction that if sec. 15-0701 were revised and expanded as suggested herein, it could withstand an attack made on the ground that a party against whom it was applied would be denied equal protection of the law is *Welch v. Swasey*⁴⁵⁶ in which the United States Supreme Court held that enforcement of a statute limiting the height of buildings in residential districts to 100 feet did not deprive the owners of such property of the equal protection of the law although the statute had left landowners in business districts free to carry their buildings to a height of 125 feet. The court's position in substance was that the object of the legislation was the reduction of the loss of life consequent upon destruction of buildings by fire, and that as the risk of loss of life from such a cause was greater in residential than in business districts, the classification and the discrimination against the owners of residential property was reasonable. It seems clear that this decision is entirely consistent with the prevailing view that a classification is justifiable which rests upon a

ground of difference having a fair and substantial relation to the object of the legislation, and under which all persons similarly circumstanced are treated alike. In short, Welch shows that tracts of land can constitutionally be divided into classes based on the location of the tracts and on the uses to which they are put, and that the owners of land in one class can be subjected to laws more burdensome than those which are to be applied to the owners of land belonging in other classes whenever such discrimination is justified by the purpose which the legislature seeks to accomplish; and this, it can be argued, is a fair description of what the recommended revision and expansion of sec. 15-0701 would involve.

Other cases in which the application of different laws to owners of different classes of land has been upheld, and which, therefore, lend support to the prediction that if the section were amended as proposed, its enforcement would not be viewed as denying equal protection of the law to the less favorably treated landowners are:

Cotton Club v. Oklahoma Tax Commission⁴⁵⁷ in which the court held that a statute prohibiting the sale of beer on premises where public dancing is permitted does not deprive an owner of such premises of equal protection.

Vartelas v. Water Resources Commission⁴⁵⁸ holding that a statute which imposes uncompensated restraints on the construction of buildings on flood plain land not yet built upon, while providing compensation for persons required to remove existing structures from flood plain land works no illegal discrimination.

Louisville & Nashville Railroad Co. v. Stuart⁴⁵⁹ in which the court took the position that a statute providing that if a railroad fails to fence its right of way, it shall be liable for the death of cattle which are killed on its tracts does not deny equal protection to railroads.

McGowan v. Maryland⁴⁶⁰ in which the court held that a statute did not involve a denial of equal protection although it

permitted operators of bathing beaches and amusement parks to sell certain goods on Sunday, while other vendors who kept the same sort of goods in stock but did not operate such places of amusement were not allowed to do so. The court said in effect that the legislature could reasonably find that the commodities were necessary for the health and recreation of its citizens, and should be sold on Sunday only by vendors located where the commodities are most likely to be put to immediate use.

State of Ohio v. Buckley⁴⁶¹ in which it was held that the exemption of scrap yards from a statute requiring junk yards outside a municipality to be obscured from the view of passersby on public highways did not violate the equal protection clauses of the federal and Ohio constitutions because there was a reasonable basis for exempting owners of scrap yards from its provisions.

8200 Realty Corporation v. Lindsay⁴⁶² deciding that a rent control statute which treated owners of buildings built prior to 1947 less favorably than owners of buildings constructed in subsequent years did not deny equal protection of the law to the first group of owners referred to since there was a rational basis for the classification.

If it be objected that because all landowners rather than merely those holding riparian tracts or land commanding a view of a natural body of water should be given rights to beauty and view reasonable in extent, the discrimination against landowners in the class created by the statute which results from the failure to recognize such rights in them is not justifiable, it might be answered that the classification which would be created by the revised section could well be held valid on the ground that owners of land riparian to or commanding a view of a lake or stream, unlike owners of ordinary land, are influenced to acquire and retain the tracts they choose primarily by their strong desire to enjoy a beautiful

view; and that the satisfaction of their aesthetic desires is therefore relatively more important to them than to landowners in general.⁴⁶³

But even if the assumption that the landowners in the class described care more about beauty than landowners in general were to be rejected as unwarranted, and even if it be conceded that the law ought to create in all landowners reasonable rights to beauty and view, it does not follow that a statute which goes only part way toward this goal should be stricken down as depriving landowners either inside or outside the class of equal protection of the law; for it is well established that legislatures are allowed to proceed one step at a time when bringing about improvements in the law, and that a statute cannot be invalidated as denying equal protection merely because it might have been given a wider scope.⁴⁶⁴

And finally it seems unlikely that the legislation recommended would be held to violate the equal protection clauses of the federal and New York constitutions even if the possibility that the two-tiered approach to equal protection problems adhered to by the United States Supreme Court in the preceding decade will be modified or abandoned actually materializes,⁴⁶⁵ and even if for that reason economic and social legislation such as sec. 15-0701 would be,⁴⁶⁶ will be subjected to scrutiny more exacting than the minimal examination which it would have undergone until recently.⁴⁶⁷ Because there is so much precedent for dividing land into classes and for subjecting the owners of the different classes to different rules of law, and because the classification which the section would create is so reasonable in the light of the object of the legislation,⁴⁶⁸ it seems probable that the section would in most cases in which its enforcement is sought survive the increased scrutiny which the modification or abandonment of the two-tiered approach would entail, and that its enforcement might even be held proper in some cases in which the freedoms of speech, religion and aesthetic preference were genuinely involved, despite the probability that in such cases the courts would continue to hold that strict scrutiny is required.⁴⁶⁹

Recapitulation as to Constitutionality

In view of the need for New York legislation creating privately enforceable rights to beauty and view in owners of land overlooking natural bodies of water,⁴⁷⁰ the possibility of constitutional obstacles in the way of its enforcement appears to be too small to be allowed to discourage the enactment of the suggested revised and expanded sec. 15-0701. While such legislation could not rest simply on the declarations of the United States Supreme Court that each state is free to change its water laws as it sees fit,⁴⁷¹ the odds in favor of the section's survival as a valid police power measure are considerable,⁴⁷² and those in favor of its being upheld as a valid exercise of the state's sovereign power, if the bed of the lake or stream is state owned, are heavy.⁴⁷³

Again, while it is clear that impairments of beauty and obstructions of view which would be clearly unreasonable and therefore unlawful under the proposed statute cannot be enjoined by the court if such a decree would curtail to too great an extent the constitutionally created freedoms of speech, religion and aesthetic preference,⁴⁷⁴ it seems unlikely that the number of cases involving such freedoms would ever constitute a significant fraction of those in which the statute would be invoked. If and when such a case does actually arise, the defendant's constitutional freedoms should and can be protected, if after resort to the balancing process they are found to outweigh the competing interests in importance;⁴⁷⁵ but the recommended legislation should nevertheless be on the statute books for application in those probably more numerous cases in which enforcement of the right to beauty and view would have no real impact on the freedoms referred to, and in which the defendant was acting in an unreasonably inconsiderate manner.

And finally it can safely be assumed that the recommended legislation would not be held to violate the equal protection clauses of the federal and New York constitutions on the ground that its enforcement would involve the denial of privileges of use to owners of land lying between natural bodies of water and tracts commanding a view of

such bodies; which privileges owners of land not so located would be free to exercise. There is ample precedent for division of land into classes and for the application to one class of laws different from that applied to another, provided the classification is reasonable because it includes all persons similarly situated with respect to the purpose of the law. That the recommended legislation fulfills this condition there can be no doubt.⁴⁷⁶

FOOTNOTES - CHAPTER 9

A small part of the research on which this study is based was supported under a joint project of the Office of Water Resources Research of the United States Department of the Interior, of the New York Temporary State Commission on Water Resources Planning, and of the Cornell University Water Resources and Marine Sciences Center.

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- 1 - 45 N.Y. Un. L.R. 1075 (1970).
- 2 - While most of the cases cited in the note involve creation of unsightly conditions or impairment of beauty rather than interference with the view of beauty, the notewriter's reference in his fn. 16 to a building obstructing the view of a beautiful mountain, and at p.401 to the complaint of landowners that a junk yard obstructed their view of a river, warrant the inference that the author of the note believed that the "aesthetic nuisance action," the maintainability of which he was recommending, should be available against persons unreasonably interfering with the view of beauty as well as against defendants creating unreasonably unsightly conditions or impairing natural beauty to an unreasonable extent.
- 3 - The pertinent parts of this section are set forth in substance at p. 6, post.
- 4 - Under the general rule, which New York supports, land must border on a natural lake or stream in order to qualify as riparian. See the authorities cited in Farnham, Permissible Extent of Riparian Land, 7 Land & Water L.R. 31,4,n.6 (1972). The question as to whether the entire area of a tract having contact with a natural body of water should always be classified as riparian is discussed in that article.
- 5 - Among the riparian rights recognized in New York at common law are the right to accretions - i.e., to land gradually added along the shore or bank of a riparian tract (*Child v. Starr*, 4 Hill 369,376 (N.Y.Ct. of Err., 1842); *Cook v. McClure*, 58 N.Y. 437,441, 17 Am.Rep. 270 (1874); the privilege of access to navigable water and of achieving such access by construction of a pier (*City of New York v. Wilson & Co.*, 278 N.Y. 86,101, 15 N.E.2d 408 [1938]); the privilege to use the water for domestic purposes without regard to the effect of such use on other riparian owners (*Garwood v. N.Y. Central & Hudson River Rr. Co.*, 83 N.Y. 400 [1881]); privileges to use the water to a reasonable extent for irrigation (*Robinson v. Davis*, 47, A.D. 405,7, 62 N.Y.S. 444 [1900]), affd. 169 N.Y. 577, 61 N.E. 1134 [1901]), for boating, fishing and bathing (*George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 [1911]), for power production and for industrial purposes (*United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N.Y. 38,44, 123 N.E. 200 [1919]). These privileges are, of course, protected by ancillary rights that their exercise shall not be unreasonably interfered with by others.

When clarity will be served by preserving a distinction between privileges and rights, the term "privilege," in conformity with Property Restatement usage will be employed in this article to denote a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act, while the word "right" will be employed to denote a legally enforceable claim of one person against another that the other shall do a given act or shall not do a given act. See Prop. Restat., sec. 1 & 2 (1936). As approving the maintenance of this distinction in water cases see *Kinyon v. McClure*, What Can a Riparian Proprietor Do?, 21 Minn. L. R. 512,4 (1937), quoted in 5 Powell on Real Prop. 350 (1971). Readers of opinions in water cases should bear in mind, however, that the courts often employ the word "right" to denote a legal freedom to act as well as to denote a legally enforceable claim with respect to the acts of others. The distinction between privileges and rights is also discussed in Hohfeld, Fundamental Legal Conceptions (1923) and Bennett, Some Fundamentals of Legal Interests in Water Supplies, 22 Sou. Cal. L.R. 1 (1948).

As to the apparent non-existence of any list of riparian interests purporting to be complete see *Meyers v. Lafayette Club*, 197 Minn. 241, 266 N.W. 861,5 (1936); *Petition of Clinton Water Dist. of Island County*, 36 Wash. 2d 284, 218 P. 2d 309,312 (1950); *Trelease*, Concept of Reasonable Beneficial Use, 12 Wyo. L.J. 1,6 (1957); and *Beck*, Governmental Refilling of Lakes & Ponds, 46 Tex. L.R. 180, 181,189-191 (1967). That riparian interests vary from state to state see *Johnson & Austin*, Recreational Rights & Title to Beds on Western Lakes & Streams, 7 Nat. Res. J. 1,5 (1967); and *Stoebuck*, Condemnation of Riparian Rights, 30 La. L.R. 394 (1970).

- 6 - See *Greene v. N.Y. Central & Hudson River Rr. Co.*, 12 Abb. New Cas. 124,137, 65 How. Pr. 154 (N.Y. Super. Ct., 1883) in which the court seems to proceed on the assumption that a right to prospect can be created by grant; *Mitchell v. Reid*, 192 N.Y. 255, 85 N.E. 65 (1908) in which the court enforced an "easement" of prospect created by grant; and *Syracuse Supply Co. v. Railway Express Agency, Inc.*, 45 Misc. 2d 1000,2, 258 N.Y.S. 2d 77 (Sup. Ct., 1965), *affd.*, 27 A.D. 2d 635, case 1, 273 N.Y.S. 2d 506 (1966), *affd.*, w.o., 20 N.Y. 2d 718, 229 N.E. 2d 612, 283 N.Y.S. 2d 44 (1967) from which it is reasonable to infer an assumption by the court that if the purpose of a setback covenant is the preservation of beauty of prospect, the covenant would create a right to such beauty. Similar cases can be found in other jurisdictions. See, for example, *Ford v. Miles*, 93 Conn. 222, 105 A. 443 (1919); *Huntington Presbyterian Congregation v. Stewart*, 8 Pa. Dist. & Co. 691 (1926); and *Jones v. Northwest Real Estate Co.*, 149 Md. 271, 131 A. 446 (1925) in which covenants or provisions expressly obligating a party not to interfere with the view from the land of another party were held valid. See also *Buck v. Adams*, 45 N.J. Eq. 552, 17 A. 961 (1889) and *Oosterhouse v. Brummel*, 343 Mich. 283, 72 N.W. 2d 6 (1955) in which the court, when enforcing setback restrictions which made no reference to view, pointed out that they

were imposed to protect the view from neighboring premises. Also pertinent are *Hannula v. Hacienda Homes, Inc.*, 34 Cal. 2d 442, 211 P. 2d 302, 19 ALR 2d 1268 (1949) & *Alliegro v. Home Owners of Edgewood Hills*, 35 Del. Ch. 543, 122 A. 2d 910 (1956) in which covenants or provisions obligating X to submit his building plans to Y for approval were treated as creating an enforceable right to beauty, provided some more practicably applicable standard than Y's personal aesthetic taste was provided by which the effect on beauty of X's proposed structure could be determined.

- 7 - *Donahue v. Keystone Gas Co.*, 181 N.Y. 313, 73 N.E. 1108, 70 LRA 761 (1905), a case which has occasionally been followed in other states. See, for example, *Skinner v. Buchanan*, 101 Vt. 159, 142 A. 72 (1928) & 10 McQuillin, *Munic. Corps.* (1966) Revised Vol. sec. 30.66.

As recognizing the possession by an owner of land abutting on a public way of a right to view from his premises see *Yale University v. City of New Haven*, 104 Conn. 610, 134 A. 268, 272, 47 ALR 667 (1926); *Anderlik v. Ia. State Highway Comn.*, 240 Ia. 919, 38 N.W. 2d 605 (1949) & *Wier v. Palm Beach County*, 85 So. 2d 865 (Fla. Sup. Ct., 1956). As contra see *Bowden v. Lewis*, 13 R.I. 189, 43 Am. Rep. 21 (1881) and *Probasco v. City of Reno*, 85 Nev. 563, 459 P. 2d 772, 4 (1969). For other authorities and discussion see 10 McQuillin, *Munic. Corps.* (1966 Revised Vol.), sec. 30.65 & 30.148 & Waite, *Property & Just Compensation*, 2 Urb. Law Annual 43 (1969).

Whether the owner of land abutting on a public highway or street possesses a right that the view from his premises should not be unreasonably interfered with is not clear. Although the Court of Appeals pointed out in *Perlmutter v. Greene* that it had referred to but never discussed easements of prospect and view, it should be noted that in *Shepard v. Manhattan Ry. Co.*, 169 N.Y. 160, 9, 62 N.E. 151 (1901) the court observed that the defendant's operations had largely neutralized the natural advantage which the plaintiff had by reason of overlooking Trinity churchyard: an observation which the court might not have made had it not believed that the plaintiff as an abutting owner had an easement of view as well as one of light and air. Moreover, in *Deckard v. Goddard*, 233 A.D. 139, 141, 251 N.Y.S. 440 (1931) the court uttered the following dictum: "...abutting owners are entitled to easements of access..., of light and air, and of the privilege of making observations, without unlawful obstruction, as to goings-on in the street." See also a dictum in *Brown-Brand Realty Co., Inc. v. Saks & Co.*, 126 Misc. 336, 9, 214 N.Y.S. 230 (Sup. Ct., 1926).

- 8 - That relief cannot be had against the erector of the fence unless it serves no useful purpose and its construction was motivated solely by malice, see *Great Atlantic & Pacific Tea Co., Inc. v. New York World's Fair 1964-1965 Corporation*, 42 Misc. 2d 855, 860, 249 N.Y.S. 2d 256 (Sup. Ct., 1964).

9 - As to the prevailing view on this point see Noel, *Unaesthetic Sights as Nuisances*, 25 *Corn.L.Q.* 1,2,7 (1939); 3 *Tiffany on Real Prop.* (3d ed.) 103 (1939); *Beuscher v. Morrison*, *Judicial Zoning Through Recent Nuisance Cases*, 1955 *Wis. L.R.* 440,456; *Cheves, Aesthetic Nuisances in Florida*, 14 *Un. of Fla. L.R.* 54,5 (1961); *Tarlock, Preservation of Scenic Rivers*, 55 *Ky. L.J.* 745,9 (1967); *Malakoff, Erosion of a Water Right*, 5 *Cal. West. L.R.* 44,63-4 (1968); note, *Nuisance - Unsightly Premises*, 5 *Land & Water L.R.* 104 (1970); note, *Aesthetic Nuisance* 45 *N.Y. Un. L.R.* 1075,1080 (1970); *Leighty, Aesthetics as a Legal Basis for Environmental Control*, 17 *Wayne L.R.* 1347,1357 (1971); 5 *Powell on Real Prop.*, sec. 705, p. 329 (1971) and the numerous cases cited by these authorities. As expressly negating the existence of a riparian right to beauty see *Bowden v. Lewis*, 13 *R.I.* 189, 43 *Am. Rep.* 21 (1881) in which the court said: "And the defendants had no right to abate it simply because it was a blot upon the landscape, for the law does not recognize any easement or right of property in a landscape or prospect." See also *Rose v. Mesmer*, 142 *Cal.* 322, 75 *P. 2d* 905,8 (1904) in which the following statement appears: A riparian owner would have no right to "insist on the full flow of the stream over his land for the mere pleasure of looking at it as a feature of the landscape." Also relevant in this connection is the following passage from *Whitmore v. Brown*, 102 *Me.* 47, 65 *A.* 516,521 (1906) in which a riparian owner failed to get an injunction restraining the erection of an unsightly wharf: "The pleasure of...a prospect free from unsightly objects may be great, but, in the present state of the law, it is too refined for legal cognizance." Also pertinent is the statement in *In re Willow Creek*, 74 *Ore.* 592, 144 *P.* 505,517 (1915) that "A riparian proprietor cannot lay claim to the undiminished flow of a stream without actual use simply because it adds beauty to the outlook." See in addition *International Shoe Co. v. Heatwole*, 126 *W. Va.* 888, 30 *S.E. 2d* 537,540 (1944) in which a riparian owner was denied relief against a stream pollution which impaired its natural beauty on the ground that "A riparian owner has no proprietary right in a beautiful scene presented by a river any more than any other owner of land could claim to a beautiful landscape," and *Gableman v. Dept. of Conservation*, 309 *Mich.* 416, 15 *N.W. 2d* 689,691 (1944) in which it was held that the defendant's use of its riparian land "cannot be restrained on esthetic grounds" by the owner of an adjoining riparian tract. As consistent with the foregoing see *Bouquet v. Hackensack Water Co.*, 90 *N.J.L.* 203, 101 *A.* 379 (*Err. & App.*, 1917).

Prominent among the few cases which have departed to a limited extent from the prevailing view that a landowner has no right to beauty is *Yeager v. Traylor*, 306 *Pa.* 530, 160 *A.* 108 (1932) in which the court held that the defendant in an action for an injunction could not build a large garage in an area filled with expensive homes unless the garage be entirely enclosed, unless all devices for raising and lowering cars be inside the garage, unless it conform in architectural design to the hotel-apartment building to which it was to be attached, and, if cars were to be parked on the roof, unless

a screen be provided "to hide the unsightly appearance" which would be created by such a practice. See also *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937) in which the court not only said that "Where...a section of a municipality is not a clearly established residential community a court of equity will not be warranted in excluding therefrom as a nuisance an automobile-wrecking business merely on the ground of unsightliness," but also declared that "an outdoor lay-out of a business of that kind necessarily is not pleasing to the view. Such business therefore, should not be located in a community of unquestioned character," and so intimated that when occasion arose it would hold that the owner of residential property in a residential neighborhood had a right to beauty. In a note in 59 W. Va. L. R. 92 (1956) it seems to be suggested that in the later case of *Martin v. Williams*, 141 W. Va. 545, 93 S.E. 2d 835, 56 ALR 2d 756 (1956) such a holding was actually rendered. After study of the *Martin* opinion, however, reasonable men might well differ as to the validity of this suggestion, as well as of the intimation in *Cheves*, *supra*, this note at 60, that certain Florida cases are inconsistent with the prevailing view.

There are, moreover, a few cases which, while they do not expressly assert the existence of a common law riparian right to beauty, are difficult to reconcile with the view that no such right exists. See, for example, *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233, 46 N.E. 591 (1897); *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585 (1935) & *City of Elsinore v. Temescal Water Co.*, 36 Cal. App. 2d 116, 97 P. 2d 274 (1939) in which the owners of lakeshore recreation resorts were allowed recovery for harm to their businesses caused by withdrawals of water from the lake which brought about, among other evils, the impairment of the beautiful scenic setting by the exposure of unsightly mud flats along the shore. Even if it be true that the decisions in these cases are based on the theory, though never clearly stated, that the defendant had violated the plaintiff's riparian right that his riparian privilege of using the lake for commercial purposes should not be unreasonably interfered with, it could be argued, in view of the stress put in these cases on the impairment of beauty, that the court's decision in each one of them involves the recognition of a riparian right to beauty in a riparian owner who is making a commercial use of his riparian privileges, even though, as intimated in *City of Los Angeles*, a riparian owner who was not engaged in a commercial operation dependent for success on the preservation of the natural beauty, would have no such right. See also *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. 2d 174, 181 (1944) which seems to go farther by indicating that the Minnesota court entertains the better view that the riparian owner would have a riparian right to beauty at common law regardless of whether he was using his riparian land for pleasure or for profit. And in *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825, 828-831 (1967) when the court enjoined the defendant's diversion of river water after pointing out that the plaintiffs were owners of residential riparian land who were

using the river for swimming, boating and fishing, and that the diminution in the river's flow interfered not only with these activities, but impaired the scenic advantages of the plaintiffs' properties, the court would seem to have recognized a common law riparian right to beauty in the plaintiffs, although it made no express reference to such a right. Note also the following statement in Judge Finley's concurring opinion in *Botton v. State*, 69 Wash. 2d 751, 420 P. 2d 352, 361 (1966) which could reasonably be interpreted as indicating his belief that private riparian owners ought to have a common law right to beauty: "There should not be - in fact there cannot be overweening sympathy for those whose conduct is destructive of the beauties of nature and the outdoor recreational resources to which more orderly and appreciative members of the public, as well as private land and home owners, should be justly and rightly entitled for many generations to come."

- 10 - As denying the existence in a landowner of a right to view at common law see *Fuller v. Arms*, 45 Vt. 400,7 (1873); *Hay v. Weber*, 79 Wis. 587, 48 N.W. 859,860 (1891); *Harrison v. Langlinais*, 321 S.W. 2d 286,8 (Tex. Civ. App., 1958); *Earl v. Arkansas State Highway Comm.*, 241 Ark. 1, 405 S.W. 2d 931 (1966) & *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116,126-7, 99 Cal. Rptr. 350 (1971). Such denial is, of course, as indicated in *Venuto*, basically consistent with the refusal of the great weight of American authority to recognize in a landowner a common law right that others shall not prevent air and light from reaching his premises. As to the weight of authority rule re air and light see 3 *Tiffany on Real Prop.* (3d ed.), sec. 718 (1939); *Rideout v. Knox*, 148 Mass. 368,372, 19 N.E. 390, 2 LRA 81 (1889); *Letts v. Kessler*, 54 Oh. St. 73, 80-3, 42 N. E. 765, 40 LRA 177 (1896); *Elgar v. Kress & Co.*, 280 A.D. 621,2, 116 N.Y.S. 2d 527 (1952), *revd. on other grounds*, 308 N.Y. 533, 127 N.E. 2d 325 (1955) & *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Ct. of App., 1959), *cert. den. w.o.*, 117 So. 2d 84 (Fla. Sup. Ct., 1960).

That riparian rights to view are recognized at common law only in Florida see *Maloney, Plager & Baldwin, Water Law & Administration, The Florida Experience*, 113 (1968). The leading Florida case recognizing the right is *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 75 Fla. 28, 79 So. 491 (1918). One of the more recent Florida cases in accord is *Padgett v. Central & Southern Fla. Flood Control Dist.*, 178 So. 2d 900 (Fla. Ct. of App., 1965). For language which conceivably might be used to support the claim that a common law riparian right to view is recognized in Michigan, see the opinion in *Obrecht v. National Gypsum Co.*, 361 Mich. 399, 109 N.W. 2d 143,152 (1960). For denials of the existence of a riparian right to view see *Whitmore v. Brown*, 102 Me. 47, 65 A. 516,521 (1906) in which the court said: "The law of this state does not recognize any legal right to an unobstructed

view of scenery over and across the lands, even the flats, of others until acquired by grant." See also *Pierpont Inn, Inc. v. State of Calif.*, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P. 2d 737, 745-6 (1969).

In *Corker*, Washington's Lake Chelan Decision 45 Wash. L.R. 65, 83 (1970) the following question is put: "Does (a) the public, (b) a contiguous landowner, or (c) a non-contiguous landowner, have a protected right to his view of the water?"; and the text immediately following the quoted question seems to assert in substance that in *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P. 2d 232, 40 ALR 3d 760 (1969), cert. den., 400 U.S. 878, 91 S. Ct. 119, 27 L. Ed. 2d 115 (1970) the court answered part (b) of this question in the affirmative. But if by "protected right" to view Professor Corker meant a right of view requiring no basis other than the ownership of riparian land, it is not entirely clear that his interpretation of the case is correct; for the court's reference was not to such a right, but rather to "a prescriptive right of view" (462 P. 2d at 239). Whether the court would have held the plaintiff entitled to a remedy for loss of view if his claim were founded on an alleged riparian right rather than on a prescriptive right appears therefore to be a speculative matter. It is interesting to note that the court cited none of the Florida cases holding that a riparian owner has a right to view merely by virtue of his riparian ownership. Another puzzling feature of *Wilbour* is the court's ready assumption that a right to view can be created by prescription although it is a right that other persons shall not do certain acts and therefore constitutes a negative easement (Prop. Restat., sec. 452 [1944]) which, according to the great weight of American authority, cannot be created by prescription, because the enjoyment of the view by the claimant of the prescriptive easement before his view has been interfered with is not a wrongful act, and so does not give the person against whom the prescriptive easement of view is claimed a cause of action by prosecuting which he can prevent the acquisition of a prescriptive easement against him; and because his possession of such a cause of action is essential to his vulnerability to prescription in view of the fact that no one should be so vulnerable unless he could have protected himself by suit and failed to do so. (Prop. Restat., com.e to sec. 458 1944); 4 Tiffany on Real Prop. (3d ed.) 555 (1939) & 3 Powell on Real Prop., sec. 413, pp. 484-5 (1970).)

11 - 254 N.Y. 245, 8, 172 N.E. 485 (1930).

12 - 259 N.Y. 327, 332, 185 N.E. 5 (1932).

13 - 284 A.D. 750, 3, 136 N.Y.S. 2d 156 (1954). Although the Court of Appeals reversed the Appellate Division's award of damages and reinstated the larger amount granted by the Court of Claims (309 N.Y. 680, 128 N.E. 2d 324 [1955]), this action does not seem to have been taken because the Court of Appeals believed that the claimant had a riparian right of beauty and view which had been extinguished and for which compensation must be made, but rather because the Court of

Appeals thought that the Appellate Division had not awarded enough compensation to the claimant for the destruction of his riparian privilege of access to navigable water. For further discussion of Crance see the 3d par. of fn. 19, post.

- 14 - 2 A.D. 2d 415, 7, 156 N.Y.S. 2d 505, lv. to app. to Ct. of App. den., 3 A.D. 2d 815, case 9, 161 N.Y.S. 2d 604 (1957).
- 15 - 48 Misc. 2d 107, 114, 264 N.Y.S. 2d 606 (Sup. Ct., 1965). While this case was reversed because of insufficient proof of damage (26 A.D. 2d 768, case 13, 271 N.Y.S. 2d 928 [1966]), there is nothing in the Appellate Division memorandum which indicates disapproval of the quoted statement. See also *Gervasi v. Brd. of Comrs. of Hicksville Water Dist.*, 45 Misc. 2d 341, 3, 256 N.Y.S. 2d 910 (Sup. Ct., 1965) in which the court denied plaintiffs recovery for a decrease in the market value of their land resulting from the erection of a water tank within sight thereof, and declared that "damages cannot be recovered because of the unsightly character of a structure" and that "aesthetic considerations are not compensable."
- 16 - 63 Misc. 2d 279, 284, 310 N.Y.S. 2d 541 (Sup. Ct.), mod., 35 A.D. 2d 987, case 5, 317 N.Y.S. 2d 989 (1970). The Appellate Division memorandum did not, however, include any statement inconsistent with the interpretation of the trial court's opinion suggested in the text.
- 17 - 36 Barb. 102, 127 (N.Y. Sup. Ct., Gen'l. Term, 1862).
- 18 - Although it could be argued that the holding in *Pierson v. Speyer*, 178 N.Y. 270, 70 N.E. 799 (1904) that a riparian owner is privileged to detain a reasonable amount of water from a stream for ornamental purposes tends to support the claim of a riparian owner to a right that the beauty of a stream shall not be unreasonably impaired by another, since a denial of such a right after recognition of such a privilege would seem to involve an inconsistency, the New York courts seem never to have cited *Pierson* as authority for the existence of a riparian right to beauty.
- 19 - In the following New York cases the owner of land, part of which was taken by the state, was awarded compensation for the decrease in the value of the part not taken caused by impairment of its beauty or of the beauty of its setting by activity on the taken part: *Matter of Brd. of Supervisors, Herkimer County*, 140 Misc. 894, 252 N.Y.S. 10 (Sup. Ct., 1931); *Brd. of Supervisors of Hamilton County v. Lawrence Brook Corp.*, 245 A.D. 892, case 4, 282 N.Y.S. 383 (1935); *Town of Fallsburgh v. Silverman*, 260 A.D. 532, 23 N.Y.S. 2d 65 (1940), affd. w.o., 286 N.Y. 594, 35 N.E. 2d 936 (1941); *Lane v. State of New York*, 265, A.D. 890, case 1, 37 N.Y.S. 2d 810 (1942); *Smith v. State of New York*, 49 Misc. 2d 985, 268 N.Y.S. 2d 873 (Ct. of Cl., 1966), affd. w.o., 29 A.D. 2d 1050, 290 N.Y.S. 2d 720 (1968) & *Purchase Hills Realty Associates v. State of New York*, 35 A.D. 2d 78, 80-1, 312 N.Y.S. 2d 934 (1970).

In the following New York cases in which the circumstances were the same as those stated in the preceding paragraph, except that the decrease in value of the remaining part was due to obstruction of view rather than to impairment of beauty, the landowner was held entitled to compensation by the condemnor: *South Buffalo Ry. Co. v. Kirkover*, 176 N.Y. 301, 68 N.E. 366 (1903); *Matter of City of New York (East River Drive)*, 264 A.D. 555, 561-2, 35 N.Y.S. 2d 990 (1942), *affd. w.o.*, 273 A.D. 884, case 3, 78 N.Y.S. 2d 364 (1948) *affd. w.o.*, 298 N.Y. 843, 84 N.E. 2d 148 (1949); *Keinz v. State of New York*, 2 A.D. 2d 415, 156 N.Y.S. 2d 505 (1956), *iv. to app. to Ct. of App. den.*, 3 A.D. 2d 815, case 9, 161 N.Y.S. 2d 604 (1957); *Minehan v. State of New York*, 28 A.D. 2d 792, case 5, 281 N.Y.S. 2d 285 (1967) & *Dennison v. State of New York*, 48 Misc. 2d 778, 265 N.Y.S. 2d 671 (Ct. of Cl., 1965), *affd.*, 28 A.D. 2d 28, 281 N.Y.S. 2d 257 (1967), *affd.*, 22 N.Y. 2d 409, 239 N.E. 2d 708, 293 N.Y.S. 2d 68 (1968).

Whether *Crance v. State of New York*, 205 Misc. 540, 128 N.Y.S. 2d 479 (Ct. of Cl., 1954), *mod.*, 284 A.D. 750, 136 N.Y.S. 2d 156 (1954), trial ct.'s judgment reinstated, 309 N.Y. 680, 128 N.E. 2d 324 (1955) can properly be included in the group of cases listed in the immediately preceding paragraph is not entirely clear. As the state took no part of claimant's land there was no partial taking involved unless the destruction by the state of the claimant's riparian privilege of access to navigable water, which privilege was appurtenant to his upland, be treated as a partial taking of the upland. (That in several situations easements appurtenant and similar interests have been treated as part of the land to which they are attached see *Holmes, The Common Law*, 385-6 (1881); 3 *Tiffany on Real Prop.* (3d ed.), sec. 761, pp. 212-3 (1939) pointing out that an appurtenant easement passes *prima facie* when the dominant estate is conveyed though no reference is made to the easement in the deed, and that a recovery of the dominant tenement in ejectment includes a recovery of an easement appurtenant to it; *com. e & illus.* 5 to sec. 487, *Prop. Restat.* (1944) indicating that one who takes adverse possession of a dominant tenement acquires the privilege of using an easement appurtenant to it & *Matter of City of New York*, 267 N.Y. 212, 223, 196 N.E. 30, 98 ALR 634 (1935). While the Court of Claims apparently believed that there had been a partial taking and in consequence of that belief gave the claimant compensation for loss of view, the Appellate Division in its opinion in the later case of *Keinz v. State of New York*, *supra* 2d par. of this fn., may have meant to take a contrary position when it stated that in *Crance* no part of the fee was taken. The reinstatement by the Court of Appeals of the Court of Claims judgment in *Crance* "upon the ground that the weight of evidence favors the findings and conclusions of the Court of Claims" sheds little if any light on the question as to whether the Court of Appeals decision was impelled by its belief that there had been a partial taking in that case, or was put on the ground previously suggested in fn. 14, *ante*.

Among the cases from jurisdictions other than New York which are in accord with the New York cases cited in the first paragraph of

this footnote are *Texas Power & Light Co. v. Jones*, 293 S.W. 885 (Tex. Civ. App., 1927); *Ohio Public Service Co. v. Dehring*, 34 Oh. App. 532, 172 N.E. 448,9 (1920); *East Baton Rouge Parish Council v. Killer*, 94 So. 2d 505 (La. Ct. of App., 1959); *Hicks v. U.S.*, 266 F. 2d 515,521 (1950); *Commonwealth of Kentucky v. Raybourne*, 364 S.W. 2d 814,6 (Ky. Ct. of App., 1963); *U.S. ex rel. TVA v. Easement in Logan County*, 336 F. 2d 76, 79-81 (1964) & *Kamo Electric Cooperative, Inc. v. Cushard*, 416 S.W. 2d 646 (Mo. Ct. of App., 1967).

Included in the cases from jurisdictions other than New York which are in accord with the New York cases cited in the second paragraph of this footnote are *Housing Authority v. Brown*, 68 Wash. 2d 485, 413 P. 2d 635,8 (1966); *State Dept. of Highways v. Singletary*, 185 So. 2d 642 (La. Ct. of App., 1966) & *Pierpont Inn, Inc. v. State of Calif.*, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P. 2d 737, 745-6 (1969). As affording analogical support for these cases see *Frankland v. City of Oswego*, 493 P. 2d 163 (Ore. Ct. of App., 1972) in which the court held that if plaintiffs were awarded damages because of defendant's unlawful amendment of a zoning ordinance, they were entitled to compensation for loss of view caused by the erection of a building authorized by the illegal ordinance.

20 - See p. 3, ante.

21 - In none of the cases cited in fn. 19, ante, did the court base its award of compensation on such a theory; and in several cases the court clearly rejected it. See, for example, *Town of Fallsburgh v. Silverman*, 260 A.D. 532,3,23 N.Y.S. 2d 65 (1940), affd. w.o., 286 N.Y. 594, 35 N.E. 2d 936 (1941) & *Matter of City of New York (East River Drive)*, 264 A.D. 555, 560, 35 N.Y.S. 2d 990 (1942), affd. w.o., 273 A.D. 884, case 3, 78 N.Y.S. 2d 364 (1948), affd. w.o., 298 N.Y. 843, 84 N.E. 2d 148 (1949) in which the courts, when awarding compensation to claimants in partial taking cases for loss of beauty and view, based their decisions on *County of Erie v. Fridenberg*, 221 N.Y. 389, 393, 117 N.E. 611 (1917) in which the court held in a partial taking case that a landowner whose well on the part not taken had been destroyed by activity on the taken part was entitled to compensation for the loss of his well, even though he would have had no cause of action if a neighbor had harmed the well when sinking one on his own land, and in which the court made the following statement which was quoted both in *Fallsburgh* and *East River Drive* as applicable to those cases: "The rights of the parties in this case are not controlled by the rule relating to the rights of adjoining owners in the legitimate use of their respective properties." Consistent with *Fridenberg* is *Campbell v. State of New York*, 39 A.D. 2d 615, 331 N.Y.S. 2d 75 (1972). See also *State Dept. of Highways v. Singletary*, 185 So. 2d 642 (La. Ct. of App., 1966) in which the court, when awarding compensation for loss of view in a partial taking case, indicated that there was no common law right to view on which the award could be based by declaring that loss of view was "not compensable as a separate item of damage;"

and Pierpont Inn, Inc. v. State of California, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P. 2d 737, 745-6 (1969) in which the court, after granting an award under similar facts, pointed out that items such as view are "not absolute rights."

- 22 - 4A Nichols on Eminent Domain (3d ed.), secs. 14.2 & 14.23 (1971); Matter of City of New York, 267 N.Y. 212, 223, 196 N.E. 30, 98 ALR 634 (1935); In re Public Beach, 288 N.Y. 75, 741 N.E. 2d 465 (1942); Matter of City of N.Y. (East River Drive), 264 A.D. 555, 563, 35 N.Y.S. 2d 990 (1942), affd. w.o., 273 A.D. 884, case 3, 78 N.Y.S. 2d 364 (1948), affd. w.o., 298 N.Y. 843, 84 N.E. 2d 148 (1949) & Pierpont Inn, Inc. v. State of Calif., 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P. 2d 737, 745-6 (1969).
- 23 - Texas Power & Light Co. v. Jones, 293 S.W. 885 (Tex. Civ. App., 1927); Town of Fallsburgh v. Silverman, 260 A.D. 532, 6, 23 N.Y.S. 2d 65 (1940), affd. w.o., 286 N.Y. 594, 35 N.E. 2d 936 (1941); Keinz v. State of New York, 2 A.D. 2d 415, 7, 156 N.Y.S. 2d 505 (1956), lv. to app. to Ct. of App. den., 3 A.D. 2d 815, case 9, 161 N.Y.S. 2d 604 (1957) & Housing Authority of City of Seattle v. Brown, 68 Wash. 2d 485, 413 P. 2d 635, 8 (1966).
- 24 - "Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its 'before' condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay...Concededly such advantages are not absolute rights, but to the extent that the reasonable expectation of their continuance is destroyed by the construction placed upon the part taken, the owner suffers damages for which compensation must be paid." - Pierpont Inn, Inc. v. State of California, 70 Cal. 2d 282, 74 Cal. Rptr. 521, 449 P. 2d 737, 745-6 (1969).
- 25 - Thus if T makes a will which includes a legacy for L, and thereby creates in L a reasonable expectation that he will ultimately receive part of T's estate, and if because D falsely represents to T that L has become a person of bad character, T executes a new will from which L is excluded, and T dies without changing that will, L has a cause of action against D. See illus. 2 & 3 to sec. 870 of the Torts Restat. (1939).

See also Prop. Restat., com. a to sec. 315 (1940); Martin v. Atlantic Coast Line Rr. Co., 268 F. 2d 397, 91 ALR 2d 472 (1959); National Airlines v. Stiles, 268 F. 2d 400, cert. & reh. den., 361 U.S. 885, 926, 80 S. Ct. 157, 291, 4 L. Ed. 2d 121, 241 (1959); 58 Mich. L.R. 606 (1960); 44 Minn. L.R. 794 & Almota Farmers Elevator & Warehouse Co. v. U.S., 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973) in which it was held that when determining the amount to be paid in eminent

domain proceedings for improvements added by a tenant to the leased premises, account must be taken of the possibility that the lease would be renewed as well as the possibility that it might not be.

- 26 - See pp. 1 & 2, ante.
- 27 - A plaintiff cannot establish the existence in himself of a cause of action against a defendant merely by showing that the defendant has caused him harm. Unless the defendant violated some right or privilege of the plaintiff when causing the harm, it is *damnum absque injuria* and not actionable. (Phillips, Code Pleading, sec. 30 [1896]); Broom's Legal Maxims (10th ed.) 118 & 120 (1939); Booth v. Rome, W. & O. Term Rr. Co., 140 N.Y. 267, 273, 35 N.E. 592, 24 LRA 105 (1893); Whitmore v. Brown, 102 Me. 47, 65 A. 516, 520-1 (1906) & Dimock v. New London, 157 Conn. 9, 245 A. 2d 569, 572, 42 ALR 3d 417 (1968).
- 28 - As holding in effect that the express terms of a statute can be supplemented by a term created by implication from the express terms and from all the facts and circumstances see *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).
- 29 - In *Texas & New Orleans Rr. v. Railway Clerks*, 25 F. Supp. 873, 5 (1928) the court said: "It is the duty of this court, wherever possible, to hold acts of Congress virile rather than sterile." This case was affmd. in 33 F. 2d 13 & 281 U.S. 548, 50 S. Ct. 427, 74 L. Ed. 1034 (1929).
- 30 - Because the last sentence of subd. (2) of sec. 15-0701 is so worded as to indicate that the beauty which the legislature wished to protect was natural beauty, and because the builder of a beautiful structure ought not to be held to have by his act created in neighboring landowners rights as to the continued existence and condition and as to the visibility of the structure enforceable either against the builder or other persons, it would seem that sec. 15-0701 should not be interpreted as creating, and that the additional legislation recommended should not be so worded as to create any right to the preservation or visibility of man-made beauty. Analogical support for this position is afforded by the holding of the Florida Supreme Court in *Hayes v. Bowman*, 91 So. 2d 795, 801 (1957) that the common law riparian right to view recognized in Florida did not enable the plaintiff to insist that the defendant should not deprive him of a view of the "bright, white tower of Stetson Law School." This holding would not, of course, stand in the way of relief for a landowner when the natural beauty of his riparian prospect was unreasonably impaired by a building erected by the defendant, or when the complainant's view was unreasonably obstructed by the defendant's building.
- 31 - "Undoubtedly, in nearly every instance, lake property is purchased because of the additional advantages and benefits arising from the nearness of the lake, its size, general character, a consideration

for nature's generosity in affording sandy beaches for swimming and outdoor recreation, its attractiveness for fishing and hunting, together with its natural beauty and scenery." - *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. 2d 174, 181 (1944). While in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162,5 (N.Y., 1816) a right to beauty and view was not even claimed, the court recognized the strength of the attraction which the view of a body of water has for the owner of land overlooking it when it said: "...it must be painful to anyone to be deprived...of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling." See also Sax & Conner, Michigan's Environmental Protection Act of 1970, 70 Mich. L.R. 1003 (1972) in which the authors say at p. 1081: "A small trout stream or scenic woodland...is often a special source of joy and refreshment to those who come back to it season after season seeking repose. These values, unpretentious as they are, lie deep in the hearts of many of our citizens..."

- 32 - That both courts and legislatures have, when they deemed it appropriate, created rights in order to give legal protection to expectations which otherwise would have none, see *Kratovil & Harrison*, *Eminent Domain - Policy & Concept*, 42 Cal. L.R. 596,613 (1954). Specially pertinent here is the following statement by these authors: "Of the profusion of novel property rights, easements of light, air, view, and the like, many, if not most, were invented by the courts in an effort to extend protection to the reasonable expectations of property owners."

- 33 - *Keats v. Hugo*, 115 Mass. 204,215, 15 Am. Rep. 80 (1874) & *Earl v. Arkansas State Highway Comm.*, 241 Ark. 1, 405 S.W. 2d 931 (1966). "Among the strongest preferences of our society is for land use to be determined largely by private volition, and legal doctrine which implements this preference is a social hypothesis that goal values can be more readily achieved with a minimum of community intervention... Individuals using their land as they desire are expected to increase total community wealth..." - *Dukeminier*, *Zoning for Aesthetic Objectives*, 20 Law & Contemp. Probs., 218,224 (1955). See also *Hooper*, *Nuisance-Unsightly Premises*, 5 Land & Water L.R. 104,105-6 (1970) & *Leighty*, *Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L.R. 1347, 1351 (1971).

- 34 - In *Leavitt v. Davis*, 153 Me. 279, 136 A. 2d 535,9 (1957) a dissenting judge said with respect to a covenant by a grantor of a seashore lot ~~that he would not erect any structure on an adjoining parcel which would interfere with the view of the ocean from the lot conveyed:~~ "While such a restriction might not be too important as to inland property, such is far from the case where seashore property is involved. One of its most valuable assets is a complete view of the ocean." There is nothing in the prevailing opinion indicating that the majority of the court doubted the truth of the quoted statement. The difference of opinion was as to whether the covenant had been violated.

- 35 - As to the provisions of sec. 15-0701 see p. 6, ante.

- 36 - Although the Torts Restat. definition of "use of water" as "a direct utilization of the water itself" (sec. 847 (1939)) and the statement in com. a to that section that no activity constitutes a use of water unless it involves a taking or harnessing of it seem to have excluded looking at water from the category of water uses, there are numerous statements by courts and legal writers which indicate acceptance of the proposition that viewing a body of water in order to enjoy its beauty is a use of the water. Thus it could be argued that the holding in *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585 (1935) that a lake is being beneficially used by the operator of a lakeside resort whose patrons are attracted to it by the recreational possibilities and beauty of the lake necessarily implies that looking at the lake is a use of it. See also as carrying the same implication the reference in *Sheldrake Associates, Inc. v. Evans*, 306 N.Y. 297, 307, 118 N.E. 2d 444 (1957) to the use of a lake for aesthetic enjoyment, and the statement in *Collins v. Wickland*, 215 Minn. 419, 88 N.W. 2d 83,7 (1958) that "The...channel...was nothing more than a minor surface-water drainway...having no utilitarian use - scenic or otherwise." Worthy of special attention in this connection is *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W. 2d 793,7 (1966) holding that while property can be taken by eminent domain only for a public use, the acquisition by the state of a scenic easement was permissible. The court said: "The learned trial judge succinctly answered plaintiffs' claim that occupancy by the public is essential in order to have public use by saying that in the instant case, 'the 'occupancy' is visual.' The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement..." As indicating approval of the idea that viewing can be a use see *Larson, Development of Water Rights*, 38 N. Dak. L.R. 243, 269 (1962); *Waite, A Four State Comparative Analysis of Public Rights in Water*, 6 (1967) & *Ohrenschall & Imhoff, Water Law's Double Environment*, 5 Land & Water L.R. 259,288 (1970).
- 37 - See the first three cases cited in the 3d par. of fn. 9, ante.
- 38 - 10 Cal. App. 2d 460, 52 P. 2d 585,8 (1935). As to the interpretation of this case in regard to this point see *Malakoff, Erosion of a Water Right*, 5 Cal. West. L.R. 44,61 (1968).
- 39 - 217 Minn. 536, 15 N.W. (2d) 174,181 (1944).
- 40 - 155 Conn. 477, 234 A. 2d 825,828-831 (1967). An uncompensated diversion of stream water, although for municipal supply, is unlawful in most riparian doctrine states on one ground or another (*Davis, Australian & American Water Allocation Systems Compared*, 9 Bost. Coll. Ind. & Coml. L.R. 647,687 (1968)), unless the stream is one over which because of its navigability (*Minneapolis Mill Co. v. Brd. of Water Comrs.*, 56 Minn. 485, 58 N.W. 33 (1894), *affd. sub nom. St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.*, 168 U.S. 349, 18 S. Ct. 157, 42 L. Ed. 497 (1897)), or because of state ownership of its bed (*State of New York v. System Properties, Inc.*, 2 N.Y. 2d 330, 141 N.E. 2d

492, 160 N.Y.S. 2d 859 (1953) & Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671,683-4 (U.S. Dist. Ct., S.D.N.Y., 1968), the state has a sovereign power which enables it to take water from the stream for any public purpose without compensating harmed riparian owners. The usual explanation of the illegality of a diversion of stream water for municipal supply when the diversion cannot be sustained under the sovereign power exception is that use for municipal supply is a non-riparian use (R.W. Johnson, Riparian & Public Rights to Lakes & Streams, 35 Wash. L.R. 580,610-611, fn. 141 (1960)); Lee, Acquisition of Riparian Rights in New York, 1964 Proceedings, Amer. Bar Assn., Sec. of Mineral & Natural Resources Law, 13,15,20; Aycock, Introduction to Water Law Use in North Carolina, 46 N. Car. L.R. 1,4,8 (1967); 2 Nichols on Eminent Domain (3d ed.), sec. 5.795 (1970) and Kennebunk etc. Water Dist. v. Maine Turnpike Authority, 145 Me. 35, 71 A. 2d 520,530 (1950)), and that a non-riparian use is unlawful when harmful (3 Tiffany on Real Prop. (3d ed.) 124 (1939); VI-A Amer. L. Prop. 162 & 164 (1954); note, 34 N. Car. L.R. 247 (1956); Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L.J. 1,2 (1957) & 5 Powell on Real Prop. 375-6 (1971). In Connecticut, however, where Collens was decided, the courts have based their imposition of liability on the ground that diversion of stream water for municipal supply is an unreasonable use of a riparian privilege. See Harding v. Stamford Water Co., 41 Conn. 87 (1874) & Dimock v. City of New London, 157, Conn. 9, 245 A. 2d 569 (1968). In accord is Oklahoma Water Resources Brd. v. Central Oklahoma Master Conservancy Dist., 464 P. 2d 748,755, 40 Okla. Bar Assn. J. 556 (Okla. Sup. Ct., 1969).

- 41 - As critical of restriction of protection against impairment of beauty to landowners who have commercially exploited it see Malakoff, Erosion of a Water Right, 5 Cal. West. L.R. 44, 61-2 (1968).
- 42 - "In many instances, an interference, whether aesthetic or otherwise, may be capable of measurement in economic terms. However, economic injury is not a prerequisite to the maintenance of a nuisance action. Thus, in the case of such nuisances as smoke and odor, a complaint alleging only discomfort and annoyance is deemed sufficient. In aesthetic nuisance actions as well, there should be no requirement of a showing of economic harm since nuisance law is not directed toward the narrow issue of economic security but rather toward a broad concern for the use and enjoyment of private property and the comfort and safety of the public at large." - Note, Aesthetic Nuisance: An Emerging Cause of Action, 45 N.Y.Un.L.R. 1075, 1090 (1970). In addition to the cases cited in the note to support the quoted passage see Campbell v. Seaman, 63 N.Y. 568,577 (1876) in which the court said: "To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighborhood property, or such as to render its enjoyment specially uncomfortable or inconvenient." See also Decker v. Goddard, 233 N.Y. 139,143, 251 N.Y.S. 440 (1931) & note, Private Remedies for Water Pollution, 70 Col. L.R. 734,742 (1970). Significant in this connection is the fact that

neither in chaps. 40 & 41 of the Torts Restat. (1939) dealing with nuisances involving interferences with the use of land and of water, nor in chap. 15 of Prosser on Torts (4th ed., 1971) covering nuisance does there appear any support for the position that proof of financial loss is prerequisite to the establishment of the existence of a nuisance.

In *Durand v. Brd. of Cooperative Educational Services*, 70 Misc. 2d 429, 334 N.Y.S. 2d 670 (Sup., 1972) plaintiffs sought an injunction restraining defendant from constructing and operating a bus maintenance facility on its premises, alleging that it would create noise, a traffic hazard, a fire hazard and would cause pollution in neighboring properties and so constitute a nuisance. After pointing out that the evidence did not substantiate any of these predictions, the court added: "Two additional factors negate the granting of an injunction: (1) There is no proof that plaintiffs' properties will suffer a diminution in value, a requisite for the granting of an injunction against an alleged nuisance, whether public or private..." It should be observed, however, that none of the four cases cited by the court as supporting this proposition actually does so. Although in each of them the court properly declared that proof of substantial damage was prerequisite to a finding of nuisance, in none of them did the court say that the evidence of damage would be insufficient if it did not include financial loss. Moreover, in one of the cases the court set forth the passage from *Campbell v. Seaman* which is quoted above.

- 43 - See *Tarlock, Preservation of Scenic Rivers*, 55 Ky.L.J. 745,754 (1967) and *Malakoff, Erosion of a Water Right*, 5 Cal. West. L.R. 44,64 (1968).
- 44 - These subdivisions read as follows: "(4) The cause of action essential to the institution and creation of a prescriptive right or privilege against a private riparian owner to continue an alteration in the natural condition of such a watercourse or lake shall not be supplied by such an alteration until it shall have caused such riparian owner harm and then only if it is unreasonable. (5) Nothing contained in this section shall, however, be construed as depriving any person or corporation having an interest in such watercourse or lake of any remedy either at law or in equity which he now has, or may hereafter acquire, under the law of this state for harm caused him by an unreasonable alteration in the natural condition of such a watercourse or lake, regardless of whether such alteration was harmful and unreasonable from its initiation or subsequently became so."
- 45 - See *Henderson Estate Co. v. Carroll Electric Co.*, 113 A.D. 775,899 N.Y.S. 365 (1906), *affd. w.o.*, 189 N.Y. 531, 82 N.E. 1127 (1907) in which the Appellate Division said: "The test is whether the use is reasonable, not whether possible injury may result." See also *Waffle v. N.Y. Central Rr. Co.*, 53 N.Y. 11 (1873) and the explanation of its holding in *Noonan v. City of Albany*, 79 N.Y. 470 (1880); *Bullard*

v. Saratoga Victory Mfg. Co., 77 N.Y. 525 (1879) & Pierson v. Speyer, 178 N.Y. 270, 70 N.E. 799 (1904). There are, however, statements in Robinson v. Davis, 47 A.D. 405, 7, 62 N.Y.S. 444 (1900), *affd.*, 169 N.Y. 577, 61 N.E. 1134 (1901) & City of New York v. Blum, 208 N.Y. 237, 243, 101 N.E. 869 (1913) which could conceivably be interpreted as indicating that the court believed that the infliction of any harm which is substantial is unlawful and actionable merely because of its substantiality. However, as the statements in the first and larger group of cited cases are more clear and specific than those in the second and smaller group of cases referred to, and as the position taken in the first group is in accord with the reasonable use version of the riparian doctrine, which version has become the majority view (see fn. 48, *post*), there is basis for the assumption that the first group of cases represents the New York law. Nevertheless, because the New York courts seem never to have attempted to reconcile the two groups of cases, it would seem desirable for the New York legislature to enact a statute in which the position is clearly taken that even a substantially harmful alteration in the natural condition of a watercourse or lake will be lawful if reasonable.

- 46 - See Tarlock, Preservation of Scenic Rivers, 55 Ky. L.J. 745, 751-4 (1967); note, Aesthetic Nuisance, 45 N.Y.Un. L.R. 1075, 1090-2 (1970) and Goldie, Amenities Rights, 11 Nat. Res. J. 274, 8 (1971).
- 47 - Under this theory the primary or fundamental right of each riparian proprietor on a watercourse or lake is to have the body of water maintained in its natural state, not sensibly diminished in quantity or impaired in quality. - 4 Torts Restat. 342-3 (1939). See also Aycock, North Carolina Water Use Law, 46 N. Car. L.R. 1, 5-6 (1967); 5 Powell on Real Prop., sec. 711, pp. 357-8 (1971) & Dimock v. New London, 157 Conn. 9, 245 A. 2d 569, 572, 42 ALR 3d 417 (1968).
- 48 - In the leading case of Dumont v. Kellogg, 29 Mich. 420 (1874) the natural flow version was criticized for its tendency to give a monopoly of the use of the stream to the riparian owner whose land is farthest from the water's source. "...the natural flow theory... should be eliminated as the first step in any program for water law modernization." - Martz, Water for Mushrooming Populations, 62 W.Va.L.R. 1, 10 (1959). In Tarlock, Preservation of Scenic Rivers, 55 Ky. L.R. 745, 750 (1967) it is said: "Because of the adverse economic consequences of this theory, it should not serve as a theoretical basis for preserving the free-flow of streams for aesthetic purposes although it could theoretically be revived." Prof. Tarlock's intimation that if the natural flow version of the riparian doctrine were to be employed to this end it would first have to be "revived" may have been prompted by the fact that the reasonable use version has become the majority view and is gaining ground. See VI-A Amer. L. Prop. 163 (1954); Cribbet, Illinois Water Rights Law 4 (1958); Bard & Beck, Institutional Overview of the North Dakota State Water Conservation Comm., 46 N. Dak. L.R. 31, 2 (1969) and 5 Powell on Real Prop., sec. 712, p. 366 (1971). In Harnsberger,

Eminent Domain & Water Law, 48 Neb. L.R. 325,370 (1969) the natural flow version is criticized as extremely wasteful, and it is attacked in 5 Powell on Real Prop., sec. 711, p. 360 (1971) as barring many beneficial uses of the gifts of nature as failing to constitute a socially useful attitude towards a natural resource.

- 49 - That under the reasonable use version of the riparian doctrine an alteration in the natural condition of a body of water is lawful if harmless see 4 Torts Restat., p. 345 & sec. 851, com. g (1939); VI-A Amer. L. Prop. 163,4 (1954); note, Stream Pollution, 50 Ia. L.R. 140,3 (1964); Maloney, Plager & Baldwin, Water Pollution, 20 Un. of Fla. L.R. 131,5 (1967) & 5 Powell on Real Prop., sec. 712, p. 364 (1971). In Harnsberger, Eminent Domain & Water Law, 48 Neb. L.R. 325,370 (1969) sec. 15-0701 of the Environmental Conservation Law of New York is interpreted as having rejected the natural flow philosophy.
- 50 - See authorities cited in fn. 47, ante.
- 51 - See authorities cited in fn. 36, ante.
- 52 - Among the New York cases denying a plaintiff riparian owner relief because the defendant's alteration of a stream, though substantially harmful to the plaintiff, was found to be reasonable are Henderson, Waffle & Bullard cited in fn. 45, ante. In the following cases the court required reasonable sharing of the water in times of shortage although such sharing resulted in substantial harm to some or all of the parties: Pratt v. Lamson, 84 Mass. 275 (1871); Bliss v. Kennedy, 43 Ill. 67 (1867); Warren v. Westbrook Mfg. Co., 88 Me. 58, 33 A. 665, 35 LRA 388 (1895); Dyer v. Cranston Print Works, 22 R.I. 506, 48 A. 791 (1901); Meng v. Coffey, 67 Neb. 500, 93 N.W. 713, 60 LRA 910 (1903) & Prather v. Hoberg, 24 Cal. 2d 549, 150 P. 2d 405 (1944). Also pertinent here are Pa. Coal Co. v. Sanderson, 113 Pa. 34,41, 3 A. 780 (1886) & W.H. Howell Co. v. Chas. Pope Glucose Co., 61 Ill. App. 593 (1895), affd., 171 Ill. 350, 40 N.E. 497 (1898).
- 53 - While in Peo. v. Stover, 12 N.Y. 2d 462, 191 N.E. 2d 272, 240 N.Y.S. 2d 734, app. dism. for want of a substantial federal question, 375 U.S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107 (1963), Matter of Cromwell v. Ferrier, 19 N.Y. 2d 862, 225 N.E. 2d 749, 279 N.Y.S. 2d 22, motion for rearg. den., 19 N.Y. 2d 862, 227 N.E. 2d 408, 280 N.Y.S. 2d 1025 (1967) & Peo. v. Goodman, 31 N.Y. 2d 262, 290 N.E. 2d 139, 338 N.Y.S. 2d 97 (1972) the Court of Appeals has taken the position that an ordinance imposing restrictions on the use of land could qualify as a valid exercise of the police power even though its sole purpose was the protection of the public interest in the preservation of aesthetic surroundings or of the social and cultural patterns of the community (see pp. 37-8, post), the New York courts have stricken down zoning ordinances which in their opinion went too far in the name of aesthetics. See, for example, Incorporated Village of Westbury v. Samuels, 46 Misc. 2d 633,7, 260 N.Y.S. 2d 369 (Sup. Ct., 1965); Bismark v. Village of Bayville, 49 Misc. 2d 604, 610, 267 N.Y.S. 2d 1002 (Sup. Ct., 1966) and Peo. v. Goodman, supra, at 266. See also note, Aesthetics and

Objectivity, 71 Mich. L.R. 1438, 1461 (1973). If the courts will in effect confine the aesthetic claims of municipalities within reasonable limits in recognition of the concurrent importance of other interests, they can quite certainly be expected to do likewise when an aesthetic claim is advanced by a private person (see Broughton, *Aesthetics & Environmental Law*, 7 Land & Water L.R. 451,474 [1972]), even though his claim is based upon a statute.

- 54 - Torts Restat., sec. 849-854 (1930); note, *Aesthetic Nuisance*, 45 N.Y. Un.L.R. 1075, 1090-2 (1970) & Prosser on Torts (4th ed.), sec. 89, pp. 596-602 (1971).
- 55 - *Timm v. Bear*, 29 Wis. 254, 266-7 (1871) & *Strobel v. Kerr Salt Co.*, 164 N.Y. 303,315, 58 N.E. 142 (1900).
- 56 - *Red River Roller Mills v. Wright*, 30 Minn. 249,254-6 (1883) & *Turner v. James Canal Co.*, 155 Cal. 82, 90 P. 520,5 (1909). As this comparison of harms would in most cases be but one of several factors which the court would take into account when passing on the issue of reasonableness, the outcome of the comparison will not be necessarily decisive in and of itself. If it were, the court would be forced to hold the defendant's harmful activity to be reasonable and lawful merely because a judgment against the defendant would cost it a million dollars whereas a judgment adverse to the plaintiff would involve a loss to him of only a thousand dollars; a holding which would afford considerable basis for the charge that the law afforded protection for the rich but not for the poor. In *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 191 N.E. 805 (1913) the court enjoined the defendant's pollution of a stream as unreasonable, although the elimination of the pollution would have cost the defendant much, while the plaintiff's damages came to only \$100 a year; and thus avoided the accusation of partiality for the rich. (For additional comment on *Whalen* see fn. 89, post.) When, however, there is no disquieting disparity between the financial resources of the parties and the plaintiff's harm if he got no relief would be small, while the harm which would be suffered by the defendant would be substantial if his activity were held unreasonable, the holding will be for the defendant, even in the absence of other factors operating in his favor. See, for example, *Kistler v. Watson*, 79 Oh. L. Abst. 552, 156 N.E. 2d 883 (1957). But cases involving such facts do not appear to be common. More typical are those in which the comparison of the harms is but one of several factors on which the judgment for the successful party is based. Thus in *Pa. Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886) the judgment that the defendant's pollution of a stream with mine water did not constitute a nuisance was based not only on the outcome in favor of the defendant of the comparison of harms, but also on the fact that the economic interests of the state of Pennsylvania would have been gravely jeopardized if the defendant's pollution were held unlawful, and on the further fact that the plaintiff could have readily avoided most of the harm he was suffering by taking advantage of an available municipal water supply. See also *Michelson v. Leskowicz*, 55 N.Y.S. 2d 831 (Sup. Ct., 1945)

affd., 270 A.D. 1042, 63 N.Y.S. 2d 191 (1946) in which the judgment for the defendant was referable not only to the fact that a contrary judgment would have caused him greater harm than the plaintiff would suffer from the judgment actually rendered, but also to the fact that the plaintiff came to the nuisance, and to the additional circumstance that the defendant's activity was not forbidden by the zoning ordinance applicable to the area.

57 - Gould v. Boston Duck Co., 13 Gray 443,453 (Mass. Sup. Ct., 1859) & City of New York v. Blum, 208 N.Y. 237, 101 N.E. 869 (1913).

58 - While it has been correctly stated that the number of cases in which a defendant guilty of nuisance has escaped injunctive restraint because of the importance of his activity to the public is "legion" (Cribbet, Changing Concepts in the Law of Land Use, 50 Ia. L.R. 245, 270-2 [1965]) - for a recent example see Boomer v. Atlantic Cement Co., 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 312 (1970) - there is relatively little authority as to whether the extent of the public's interest in the defendant's activity can be taken into account when passing on the question as to whether the defendant has been guilty of nuisance and is therefore liable in damages. Prominent among the few cases considering this question and answering it in the affirmative is Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886), as to which see fn. 56, ante. In accord are Mizell v. McGowan, 129 N. Car. 93, 39 S.E. 729 (1901); Brd. of Drainage Comrs. of Drainage Dist. No. 10 v. Brd. of Drainage Comrs. of Washington County, 130 Miss. 764, 95 So. 75, 23 ALR 1250 (1923); Petraborg v. Zontelli, 217 Minn. 536 15 N.W. 2d 174,183 (1944); Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571,4 (1951); Wasserburger v. Coffee, 80 Neb. 149, 141 N.W. 2d 738,746 (1966); Joslin v. Marin Munic. Water Dist., 67 Cal. 2d 132, 60 Cal. Rptr. 377, 42 P. 2d 889,895 (1967) & Thompson v. Enz, 379 Mich. 667, 154 N.W. 2d 473,484-5 (1967).

The position taken in these cases is consistent with Holmes' statement in The Common Law (1881) at pp. 35-6 that "The very considerations which judges most rarely mention...are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." In accord is Kauper, Civil Liberties & the Constitution, 146 (1962) in which it is said: "...courts have always taken policy considerations into account in defining the content and scope of private rights." Compare Daynard, The Use of Social Policy in Judicial Decision-making, 56 Corn.L.R. 919 (1971).

Among the cases in which it has been held that public policy should not be taken into account when deciding whether or not the

defendant has been guilty of a nuisance are *Columbus & Hocking Coal & Iron Co. v. Tucker*, 48 Oh.St. 41,59, 26 N.E. 630, 12 LRA 577 (1891); *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 55-6, 33 Sup. Ct. 1004, 57 L. Ed. 1384 (1913) & *Panther Coal Co. v. Looney*, 185 Va. 758, 40 S.E. 2d 298, 301 (1946).

Whether New York is in accord with the first and larger of the two groups of cases cited above is not clear. Although *Prentice v. Geiger*, 74 N.Y. 341,5 (1878) might conceivably be interpreted as putting New York in this group, *Strobel v. Kerr Salt Co.*, 164 N.Y. 303, 58 N.E. 142 (1900) could reasonably be read as impliedly overruling *Prentice* in this respect and as rejecting the doctrine of *Pa. Coal Co. v. Sanderson*. It should, however, be noted on the other hand that the report of the *Strobel* case does not show whether the defendant actually attempted to establish that its activity was of greater importance than the activities of the several plaintiffs to the New York State public or to the inhabitants of the area in which the litigants' plants were located. Moreover, there seem to have been no facts in evidence on which a finding favorable to the defendant in this regard could have been founded. It could, therefore, be argued that such statements in the *Strobel* opinion as could be interpreted as indicating that the public interest can not be taken into account when passing on the reasonableness and legality at law of the defendant's activity were obiter dicta not necessary to the decision of the case. Moreover, it should be borne in mind that in *Booth v. Rome, Watertown and Ogdensburg Terminal Rr. Co.*, 140 N.Y. 267,277,280-1, 35 N.E. 592, 24 LRA 105 (1893) in which it appeared that the defendant's blasting to prepare its land for use jarred the neighboring premises of the plaintiff to such an extent as to damage his house, the court in arriving at a holding that a judgment for damages rendered in favor of the plaintiff by the court below could not be affirmed on the theory that the defendant had been guilty of nuisance, took account of the importance to the public of the activities of both the plaintiff and defendant. It seems quite unlikely that the court which decided *Strobel* was unacquainted with the *Booth* case (particularly since it was cited in one of the briefs), or entertained the opinion that its doctrine would be inapplicable to a case merely because it involved a question as to the reasonableness of the use of a stream rather than a question as to the reasonableness of the use of a tract of land. In other words, in view of the analogy afforded by *Booth*, of the position of the weight of authority in other states, and of the virtually unanimous opinion of the learned writers that the relative importance to the public of the activities of the plaintiff and defendant should be taken into account when the issue is as to the reasonableness of the defendant's alteration of a body of water (note, *Purity & Utility*, 84 Un. of Pa. L.R. 630,7 [1936]); *Kinyon v. McClure*, *What Can a Riparian Owner Do*, 21 Minn. L.R. 512, 523-4 (1937); *Maloney, Plager & Baldwin*, *Water Pollution*, 20 Un. of Fla. L.R. 131, 6 (1967); *Levi*, *Highest & Best Use: An Economic Goal for Water Law*, 34 Mo. L.R. 165,8 (1969) & *Lauer*, *Reflections on Riparianism*, 35 Mo.

L.R. 1,24-5 [1970]), it seems probable that the New York courts will, when squarely confronted with the question, answer it in the affirmative.

- 59 - "It is true...that no degree of pollution by others would justify an unlawful or unreasonable use of the stream by the defendants; but it is obvious that this evidence (of pollution by others) was competent for the very purpose of enabling the jury and the court to determine whether such use was reasonable." - *Townsend v. Bell*, 167 N.Y. 462,470, 60 N.E. 757 (1901).
- 60 - 361 Mich. 399, 105 N.W. 2d 143,151 (1960). See in accord *Prosser on Torts* (4th ed.), sec. 89, p. 599 (1971); *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37,41, 258 N.Y.S. 229 (1932) & *Aldridge v. Saxey*, 242 Ore. 238, 409 P. 2d 184,7 (1965).
- 61 - *Malakoff, Erosion of a Water Right*, 5 Cal. West. L.R. 44,64 (1968).
- 62 - See *Tarlock, Preservation of Scenic Rivers*, 55 Ky. L.J. 745,753-4 (1967) & *Malakoff, Erosion of a Water Right*, 5 Cal. West. L.R. 44,64 (1968).
- 63 - The infliction of practicably avoidable harm is normally held to be unreasonable or negligent and leads to liability. See *Torts Restat.*, com. g to sec. 853 (1939); *Prosser on Torts* (4th ed.), sec. 89, p. 599 (1971) & *City of New York v. Blum*, 208 N.Y. 237,243, 101 N.E. 869 (1913) in which the court said: "The question in a nutshell is whether it is reasonable for the defendant to divert the water from its natural channel and to return it, laden with the excreta of his domestic animals, when he can with slight trouble prevent such pollution," and held that the trial court was justified in deciding that the defendant was making an unreasonable use of the stream.
- 64 - Note, *Water Quality Standards in Private Nuisance Actions*, 79 Yale L.J. 102,110 (1969).
- 65 - See authorities cited in fn. 40, ante. However, as far as the law of California is concerned, this statement may need qualification because of *Joslin v. Marin Municipal Water Dist.*, 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 P. 2d 889, 895-8 (1967) in which it was held that a riparian owner who was using the capacity of a stream to replenish gravel and sand deposits on his riparian land could have no relief against the upstream defendant which as an appropriator claimed the privilege of diverting so much of the stream for public supply that its gravel and sand deliveries to the plaintiff were seriously diminished. The court pointed out that a provision in the California constitution made it clear that the public interest required the conservation of the available water supplies in the state; that the plaintiffs had not shown or even claimed that the public interest required the conservation of the state's available supply of sand and gravel suitable for commercial use; that in consequence the plaintiffs' use of the

stream was unreasonable as a matter of law; that under the California constitution there could be a property right only in a reasonable use; that it followed that the defendant's diversion of the water would not violate any property right of the plaintiffs, and that they were therefore not entitled to compensation on the ground that their property had been taken for a public use. While it can be argued that *Joslin* should not be read as according a preferred status to a claim of water for municipal supply, because such an interpretation would (1) be inconsistent with the statement made by the California Supreme Court only two years prior to *Joslin* in *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P. 2d 129,137 (1965) that "the cost of such damage (inflicted by a public improvement) can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged;" (2) appear to be in conflict with sec. 1245 of the California Water Code which requires compensation to be given for damage done to property interests when a municipality enters a watershed to acquire a water supply; and while it can be argued further that since the defendant in *Joslin* was claiming as an appropriator rather than as a riparian owner, its success was solely referable to the unreasonableness of plaintiffs' use rather than to the defendant's ability to show that use of water for municipal supply was more reasonable on the riparian doctrine scale than uses for most other purposes, it must be conceded that the *Joslin* opinion is not so worded as definitely to exclude the latter interpretation, and that it is therefore conceivable that in California a claim to purely aesthetic rights, even if the California legislature should enact a statute purporting to create them, might find it difficult to survive when in conflict with a claim for municipal supply. For an extended discussion of the significance of *Joslin* see Malakoff, *Erosion of a Water Right*, 5 Cal. West. L.R. 44 (1968).

- 66 - See *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526 (N.Y., 1816); *Gray v. Village of Fort Plain*, 105 A.D. 215, 94 N.Y.S. 698 (1905); *Matter of Van Etten v. City of New York*, 226 N.Y. 483, 124 N.E. 201 (1919); *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E. 2d 801 (1936) & *Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 43 N.E. 2d 803 (1942).
- 67 - As to a state's sovereign power over certain bodies of water see fn. 40, ante.
- 68 - Moreover, despite the public interest in the ability of municipalities to find outlets for their sewage, owners of land riparian to a stream are held entitled to relief against a municipality which pollutes the stream by discharging sewage into it. See 18 McQuillin, *Law of Munic. Corps.* (3d ed. rev.), sec. 53,131 (1963); Aycok, *Water Use Law in North Carolina*, 46 N. Car. L.R. 1,13 (1967); *City of Mansfield v. Balliett*, 65 Oh. St. 451, 63 N.E. 86, 58 LRA 628 (1901) & *Donnelly Brick Co., Inc. v. City of New Britain*, 106 Conn. 167, 137 A. 745

(1927). New York Cases in accord are *Chapman v. City of Rochester*, 110 N.Y. 273, 18 N.E. 88, 1 LRA 296 (1903); *Sammons v. City of Gloversville*, 175 N.Y. 346, 67 N.E. 622 (1903) & *Luther v. Village of Batavia*, 169 A.D. 71, 154 N.Y.S. 784 (1915). Such immunity from suit as a municipality may enjoy when performing a governmental function does not shield it from liability if such performance results in the creation of a nuisance interfering with plaintiff's enjoyment of his land. See 18 McQuillin, *Law of Munic. Corps.* (3d ed. rev.), secs. 53.11, 53.12, 53.47, 53.49 & 53.127 (1963) & *Rhodes v. City of Durham*, 165 N. Car. 679, 81 S.E. 938 (1914).

69 - 155 Conn. 477, 234 A. 2d 825, 828-831 (1967).

70 - See pp. 9-10, ante.

71 - See fn. 40, ante.

72 - See fn. 40, ante.

73 - *Kratovil & Harrison, Eminent Domain - Policy & Concept*, 42 Cal. L.R. 596 (1954); *Mayberry & Alois, Compensation for Loss of Access in Eminent Domain*, 16 Buf. L.R. 603, 647-8 (1967) taking the position that the public should be expected to bear the cost of any improvement it makes, through the sovereign, for its own benefit, and that the police power should not be exercised to pauperize; *Kates, Georgia Water Law* 68 (1969) stating that "the economic burden of a change for the benefit of the public should not be assumed by a few people;" *Lictermann, Rights & Remedies of a New York Landowner for Losses Due to Governmental Action*, 33 Alb. L.R. 537, 551-2 (1969); *U.S. v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S. Ct. 761, 89 L. Ed. 1101 (1945); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P. 2d 129, 136-7 (1965); *Furrer v. Talent Irrig. Dist.*, 258 Ore. 494, 466 P. 2d 605, 613 (1970); *State v. Johnson*, 265 A. 2d 711, 716, 46 ALR 3d 1414 (1970); & *Forbell v. City of New York*, 164 N.Y. 522, 7, 58 N.E. 644, 51 LRA 695 (1900) holding that abstractions of underground water for municipal supply is an unreasonable act for which the defendant is liable. Analogical support for the position taken in the text is afforded by the last reason given for the decision in *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A. 2d 4, 10, 59 ALR 2d 413 (1956).

74 - *Dunham, A Legal & Economic Basis for City Planning*, 58 Col. L.R. 650, 663-9 (1958); *Sax, Takings & the Police Power*, 74 Yale L.J. 36, 67 (1964) *Trelease, Policies for Water*, 5 Nat. Res. J. 1, 35 (1965) & *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585, 590, 592 (1935). As to Professor Sax's present personal position see fns. 230 and 253, post.

75 - As to the public acceptance of zoning as a means of equitably adjusting the interests of neighboring landowners inter se see *Bove v. Donner-Hanna*

Coke Corp., 236 A.D. 37,43, 258 N.Y.S. 229 (1932) & Waite, Governmental Power & Private Property, 16 Cath. Un. of Amer. L.R. 283,6,fn. 6 (1967). Fifty states have conferred zoning power on various units of local government. (6 Powell on Real Prop., sec. 868, p. 122 [1971].)

- 76 - Thus while subd. (2) of sec. 280 of the N.Y. Genl. Munic. Law authorizes towns or villages within Lake George Park to enact zoning ordinances limiting all buildings within a designated area to one or two uses - an authorization which at first glance might seem to be primarily for the benefit of the residents of the designated areas, subd. (1) of the section declares that the subject matter of the section is of interest to all the people of the state. In *Deimeke v. State Highway Comn.* 444 S.S. 2d 480,4 (Mo. Sup. Ct., 1969) the court said: "Property use which offends sensibilities and debases property values affects not only the adjoining property owners in that vicinity but the general public as well because when such property values are destroyed or seriously impaired, the tax base of the community is affected and the public suffers economically as a result." See also note, Zoning, Aesthetics and the First Amendment, 64 Col. L.R. 81,2 (1964) & 6 Powell on Real Prop., sec. 867, p. 108 (1971).
- 77 - See *Bazinsky v. Kesbec, Inc.*, 259 A.D. 467,471, 19 N.Y.S. 2d 716 (1940), *affd.* on other grounds, 286 N.Y. 655, 36 N.E. 2d 694 (1941) and *Golden v. Planning Brd. of Town of Ramapo*, 30 N.Y. 2d 359, 285 N.E. 2d 291, 334 N.Y.S. 2d 138, *app. dism.* for want of a substantial federal question, 409 U.S. 1003, 93 S. Ct. 440, 34 L. Ed. 2d 294 (1972) in which the court held that the enactment of a town ordinance designed to slow down the rate of residential construction for 18 years, if necessary to assure that each new home built in the town would have available to it the essential minimum of public services, was authorized by secs. 261 & 263 of the Town Law and that these sections were constitutional. The dissent denied that these sections were broad enough to authorize such an ordinance, and suggested that even if they were, they might be unconstitutional because such an ordinance did not provide sufficient protection for regional and state interests.
- 78 - Pertinent in this connection is the statement in Waite, *A Four State Comparative Analysis of Public Rights in Water*, 32 (1967) that in Wisconsin "perhaps the future will see more thought given to accommodating the public rights...to the rights of riparian recreation interests."
- 79 - See N.Y. Unconsolidated Laws, secs. 6251-6285 construed and held constitutional in *Floyd v. N.Y. State Urban Development Corp.*, 33 N.Y. 2d 1, 300 N.E. 2d 704, 347 N.Y.S. 2d 161 (1973). But see also L. 1973, c. 446, which by empowering municipalities to block UDC projects under certain circumstances shows that the N.Y. Legislature still believes that in some cases the public interest is served by legislation protecting the local zoning power. Indeed, the Legislature

wanted to go farther in that direction than did the Governor. See the comment in Floyd on Assembly Bill No. 650 (1972) which he vetoed.

- 80 - One such region is that in which the Finger Lakes lie.
- 81 - That a private nuisance at common law consists of the invasion of a person's interests in the private use and enjoyment of land see 4 Torts Restat. 220 (1939) & Prosser on Torts (4th ed.) 591 (1971).
- 82 - Prosser on Torts (4th ed.) 586-7 (1971); Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 Ecol.L.Q. 241,250 (1972); McManus v. Southern Ry. Co., 150 N. Car. 655, 64 S.E. 766 (1909) & Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116,124, 99 Cal. Rptr. 350 (1971).
- 83 - Prosser on Torts (4th ed.) 588-9 (1971); Wesson v. Washburn Iron Co., 95 Mass. 95, 100-3, 90 Am. Dec. 181 (1866); Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82,3 (1900); McManus v. Southern Ry. Co., 150 N. Car. 655, 64 S.E. 766,768-9 (1909); Dist. of Columbia v. Totten, 5 F. 2d 374, 379-380, 55 U.S. App. D.C. 321 (1925) & Ozark Poultry Products, Inc. v. Garman, (251 Ark. 389) 472, S.W. 2d 714, 3 E.R.C. 1545 (1971). See also Bryson and Macbeth, Public Nuisance, the Restatement (Second) of Torts, & Environmental Law, 2 Ecol.L.Q. 241, 261 (1972).
- 84 - See authorities cited in fn. 83, ante.
- 85 - Francis v. Schoellkopf, 53 N.Y. 152,4 (1873) & Fisher v. Zumwalt, 128 Cal. 493, 61 P. 82,3 (1900). Analogical support is afforded for this position by U.S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973).
- 86 - Cases like Bouquet v. Hackensack Water Co., 90 N.J.L. 203, 101 A. 379 (Err. & App., 1917) should not stand in the way of fulfillment of this prediction. While it was held in Bouquet that a riparian owner could not recover for interference with his boating and swimming on and in a navigable river caused by defendant's pollution of the river, the decision was not based on the court's rejection of the doctrine stated in the text and supported by the authorities cited in fn. 83, ante, but rather on the view that the plaintiff, although a riparian owner, had no private boating and swimming rights in the river but only such rights of that sort as were held by the general public. Since the plaintiff could not show the violation of a private right, he could not show that he had been harmed by the creation of a private nuisance. The holder of a statutory private right to beauty would obviously be in a better position in this respect.
- 87 - Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E. 2d 801 (1936); Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 7 N.E. 2d 10 (1937) & Edsall v. Village of Ilion, 37 A.D. 2d 684, case 10, 323 N.Y.S. 2d 211 (1972). That the receipt of a permit from a state administrative agency to do certain acts does not relieve the

permitee from liability in damages if such acts violate riparian privileges or rights see *Ferguson v. Village of Hamburg*, supra; *Botton v. State*, 69 Wash. 2d 751, 420 P. 2d 352, 8 (1966); *Lawrence v. State Dept. of Health*, 247 Md. 367, 231 A. 2d 46 (1967); *Joslin v. Marin Munic. Water Dist.*, 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 F. Supp. 671, 683 (1968) & *Edsall v. Village of Ilion*, supra. The fact that a defendant has acted under authority granted by a state statute will relieve it from liability in damages for violating riparian and other private property rights only when the interference with the convenience of the plaintiff is minor rather than major. See note, *Nuisance & Legislative Authorization*, 52 Col.L.R. 781, *Gardner v. Village of Newburgh*, 2 Johns, Ch. 162, 7 Am. Dec. 526 (N.Y., 1826); *Harding v. Stamford Water Co.*, 41 Conn. 87, 93 (1874); *Sammons v. City of Gloversville*, 175 N.Y. 346, 352, 67 N.E. 622 (1903); *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S. Ct. Kingfisher, 59 Okla. 222, 158 P. 926 (1916); *Greenwood v. Evergreen Mines Co.*, 220 Minn. 296, 19 N.W. 2d 726 (1945) & *Phillips v. Hassett in Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825, 834 (1967) in whom the court seems to have recognized a common law riparian right to beauty (see 3d par. of fn. 9, ante.) were granted an injunction against the defendant, despite its possession of the power of eminent domain, restraining its diversion of river water for municipal supply, the case casts no doubt on the truth of the statement in the text in view of the fact that the defendant had failed to show that it needed the diverted water to supply its customers, and of the further fact that the court reminded the defendant that it could exercise its power of eminent domain whenever it had actual need for the water.

- 88 - As to this doctrine see *Walsh, Equity*, 293-4 fn. 24 (1930); *Torts Restat.*, sec. 941 (1939); *Prop. Restat.*, secs. 563-4 (1944); *McClintock, Equity* (2d ed.), sec. 128 (1948); 11 *Williston, Contracts* (3d ed.), sec. 1425, p. 832 (1968) & *Prosser on Torts* (4th ed.), sec. 90, pp. 603-4 (1971).
- 89 - See, for example, *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904); *Monroe Carp Pond Co. v. River Raisin Paper Co.*, 240 Mich. 279, 215 N.W. 325 (1927) & *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 312 (1970). That there are many cases in accord see *Cribbet, Changing Concepts in the Law of Land Use*, 50 Ia. L.R. 245, 270-2 (1965). But if instead of showing that the public interest requires the continuance of his operation, the defendant merely shows that he himself would lose more if he were enjoined than the plaintiff would lose if injunctive relief were denied him, the defendant will usually fail to escape an injunction. See *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1919) and the comment

on that case in fn. 56, ante. In *Durand v. Brd. of Cooperative Educational Services*, 70 Misc. 2d 429,434, 334 N.Y.S. 2d 670 (Sup. Ct., 1972) *Boomer* is correctly interpreted as denying an injunction because of the public interest in the continuation of defendant's activity; and the importance of differentiating between the interests of the public and of the defendant in these cases is properly stressed in *Bryson & Macbeth, Public Nuisance*, the Restatement (Second) of Torts, and *Environmental Law*, 2 *Ecol.L.Q.* 241, 270-3 (1972).

While *Boomer* could conceivably be read as overruling *Whalen*, as it has been by the writers of several law review comments, it should be noted that the apparent failure of the defendant in *Whalen* to argue that an injunction should be denied as contrary to the public interest, and the absence of any finding by the court that an injunction would be contrary to that interest, afford bases for the contention that *Whalen* and *Boomer* are distinguishable and can therefore stand together. The fact that local public opinion was about evenly divided as to the desirability of enjoining the defendant in *Whalen* from continuing its pollution may have been enough to deter the court from taking the position that the defendant's interest and that of the public were identical. As to the relevance in this type of case of the desires of the people living nearby see *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super, 62, 122 A. 2d 233 (1956).

- 90 - Note, *Power Plant Siting Decisions*, 57 *Corn.L.R.* 80,9 (1971).
- 91 - See pp. 6-7, ante.
- 92 - See *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W. 2d 738,747 (1966).
- 93 - See pp. 10-11, ante.
- 94 - *Barger v. Barringer*, 151 N. Car.433, 66 S.E. 439,445 (1909); Noel, *Unaesthetic Sights as Nuisances*, 25 *Corn.L.Q.* 1,17 (1939); Dukeminier, *Zoning for Aesthetic Objectives*, 20, *Law & Contemp. Probs.* 218,225 (1955); comment, *Nuisance - Aesthetic Grounds*, 59 *W.Va.L.R.* 92,4 (1956); Newsom, *Zoning for Beauty*, 5 *New England L.R.* 1-2 (1969) and note, *Aesthetic Nuisance*, 45 *N.Y.Un.L.R.* 1075, 1089-1090 (1970).
- 95 - *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 192 S.E. 291,3, 110 *ALR* 1454 (1937).
- 96 - It has been suggested that the difficulty of deciding whether the beauty of a prospect has actually been decreased in a particular case will be reduced to surmountable proportions if the trier of the fact uses as the criterion of unsightliness the taste of the normal reasonable man. See Noel, *Unaesthetic Sights as Nuisances*, 25 *Corn.L.Q.* 1,4 (1939) & Cheves, *Aesthetic Nuisances in Florida*, 14 *Un. of Fla. L.R.* 54,60 (1961). But although it is true that if the defendant

had installed a permanent clothesline in the frontyard of his residential premises, a trier of the fact could find without hesitation that he had impaired the beauty of his neighbors' prospect, because a clothesline so located would be offensive to the sensibilities of the average person (see *People v. Stover*, 12 N.Y. 2d 462, 8, 191 N.E. 2d 272, 240 N.Y.S. 2d 734, app. dismissed for want of a substantial federal question, 375 U.S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107 (1963)), the courts might well be confronted with cases in which the reaction of the average person to the defendant's handiwork could not be so readily determined. For expressions of doubt as to the merit of the average, normal man criterion see comment, Nuisance - Aesthetic Grounds, 59 W.Va.L.R. 92, 4 (1956); comment, Zoning, Aesthetics & the First Amendment, 64 Col.L.R. 81, 90-1 (1964) & Broughton, Aesthetics & Environmental Law, 7 Land & Water L.R. 450, 473-4 (1972).

- 97 - *Eveleth*, New Techniques to Preserve Areas of Scenic Attraction, 18 Syr.L.R. 37, 44-5 (1966). For the suggestion that the difficulty of deciding whether beauty has been impaired is less when the character of the area itself provides a standard of reference see note, 79 Harv.L.R. 1320, 2 (1966). Consistent with this suggestion is the text of fn. 5 at p. 74 of Magid, Aesthetic Pollution Control, 19 Wayne L.R. 73 (1972); and Note, Aesthetics and Objectivity, 71 Mich.L.R. 1438, 1443 (1973). See also *Mayor of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A. 2d 828, 825, 41 USLW 2461 (1973) in which the court emphasized the distinction between ordinances for the protection of existing beauty and those intended to result in the creation of beauty which are difficult to apply because of the lack of commonly agreed on criteria by which the beauty of a structure may be judged.
- 98 - 149 Md. 271, 131 A. 446 (1925). In accord see *Alliegro v. Home Owners of Edgewood Hills*, 35 Del. Ch. 543, 122 A. 2d 910 (1956). Also pertinent in this connection is *State ex rel. Stoyanoff v. Berkeley*, 458 S.W. 2d 305, 311-2 (1970) upholding an ordinance authorizing an architectural board to disapprove an application for a building permit if it finds that the proposed structure will not be in general conformity with the style and design of surrounding structures.
- 99 - See pp. 10-11, ante.
- 100 - See the hypothetical case stated at p. 14, ante.
- 101 - "There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine." - *Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P. 2d 5, 18 (1933).

- 102 - 77 N.Y. 525 (1879).
- 103 - VI-A Amer. L. Prop. 169-170 (1954); Hutchins & Steele, Basic Water Rights Doctrines, 22 Law & Contemp. Probs. 276,284 (1957); Trelease, A Model State Water Code, id. 301,8; Water Resources & the Law (chap. by Lauer) 197,8 (1958); O'Connell, Iowa's New Water Statute, 46 Ia. L.R. 549, 624-5 (1962); 5 Water for Peace (chap. by Ellis) 649,650 (1967); Sax, Water Law Planning & Policy 202 (1968); Ohrenscha11 & Imhoff, Water Law's Double Environment, 5 Land & Water L.R. 259, 280 (1970); Powell on Real Prop., sec. 715 (1971) & the Pratt, Bliss, Gould, Warren, Dyer, Meng and Prather cases cited in fn. 52, ante.
- 104 - 217 Minn. 536, 15 N.W. 2d 174 (1944).
- 105 - 225 Ark. 436, 283 S.W. 2d 129, 54 ALR 1440 (1955).
- 106 - See Tarlock, Preservation of Scenic Rivers, 55 Ky. L.R. 745,751 (1967).
- 107 - See pp. 7-18, ante.
- 108 - By virtue of the principle of variability, which is a component of the reasonable use version of the riparian doctrine, a use of water which is reasonable and lawful in one year may, if conditions in the watershed change, become unreasonable and unlawful later on. (Farnham, Improvement of New York Water Law, 3 Land & Water L.R. 377,391 (1968)). As to the advantages of the reasonable use version see pp. 405-411.
- 109 - As to the differences between the natural flow and reasonable use versions of the riparian doctrine see pp. 11-12 & fns. 47 and 49, ante.
- 110 - Since under the reasonable use version of the riparian doctrine all harmless uses are reasonable and lawful, no water need flow down to the sea unused so long as it be made use of without causing harm to other riparian owners. Thus if only one of the riparian proprietors is using the water, he may take it all so long as that state of affairs continues. See Warren v. Westbrook Mfg. Co., 88 Me. 58, 33 A. 665, 7, 35 LRA 388 (1895); Joerger v. Mt. Shasta Power Corp., 214 Cal. 630,7 P. 2d 706,8 (1932); fn. 49, ante & Farnham, Improvement of New York Water Law, 3 Land and Water L.R. 377, 382-3 (1968). But that water should not be deemed unused simply because the riparian owners are merely enjoying its beauty see p. 9 and fn. 36, ante.
- 111 - As to the importance of the maintenance of flexibility in the pattern of water uses see Farnham, Improvement of New York Water Law, 3 Land and Water L.R. 377, 408-9 (1968). The following comment would seem to have pertinence here: "Since it is impossible to legislate precise aesthetic standards, it is likely that the reasonableness rule of nuisance actions and case-by-case analysis by the courts will remain for some time the best means for dealing with threats to natural beauty." - Bryson & Macbeth, Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 Eco1.L.Q. 241,280 (1972).

- 112 - Although it seems virtually certain that sec. 15-0701 as it now stands would be interpreted as giving causes of action for impairment of natural beauty only when the impairment is unreasonable, the section does not expressly so declare. (See pp. 11-12, ante.) It would, therefore, seem advisable when amending the section to add explicit language to that effect.
- 113 - See pp. 7-8, ante.
- 114 - See pp. 7-8, ante.
- 115 - As to the standard of reference provided by nature see p. 19, ante.
- 116 - As to the difficulty of this question see p. 19-21, ante.
- 116a - As to the effect of the distance of the scenery from the Viewer on the value of the scenery see Note, Aesthetics and Objectivity, 71 Mich.L.R. 1438, 1446 (1973).
- 117 - See *Sparks Mfg. Co. v. Town of Newton*, 57 N.J. Eq. 367, 41 A. 385, 395 (1898), revd. on other grounds, 60 N.J. Eq. 399, 45 A. 596 (Err. & App., 1900); *McCartney v. Londonderry & Lough Swilley Ry. Co., Ltd.*, (1904) A.C. 301, 311; *McCarter v. Hudson County Water Co.*, 70 N.J. Eq. 695, 65 A. 489, 494 (Err. & App., 1906), affd. 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908) & *Attwood v. Llay Main Collieries, Ltd.*, (1926) 1 Ch. 444, 459-460. For comment see Farnham, *Permissible Extent of Riparian Land*, 7 Land and Water L.R. 31, 45 (1972).
- 118 - See pp. 12-13, ante.
- 119 - See 2d par. of fn. 10, ante. It could be argued that in dealing with this right the Florida courts have taken a position consistent with that recommended at pp. 11-12, ante with respect to a right to beauty: viz., that the riparian owner does not have a right that his view of the water shall never be obstructed at all, but rather that it shall not be obstructed to an unreasonable extent. See *Freed v. Miami Beach Corp.*, 93 Fla. 888, 112 So. 841 (1927); *Duval Engineering and Contracting Co. v. Sales*, 77 So. 2d 421 (Fla. Sup. Ct., 1955) & *City of Eustis v. First*, 113 So. 2d 260 (Fla. Ct. of App., 1959) in which the existence of a riparian right to view is recognized, but the riparian plaintiff is denied relief. While in none of these cases did the court say expressly that a riparian owner's right to view is merely a right that his view shall not be unreasonably obstructed, in each case the court stressed the fact that the defendant had not interfered with the plaintiff's view to a material extent; and by so doing appeared to be applying the reasonableness doctrine, since under it the gravity of the harm to the plaintiff is one of the principal factors taken into account when passing upon the reasonableness of defendant's conduct (Torts Restat., secs. 852 & 854 (1939); Prosser on Torts (4th ed.) sec. 89, pp. 596-602 [1971]).

- 120 - See pp. 7-8, ante.
- 121 - "The fronting of a lot on a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purposes. The right of access to the property over the water, the unobstructed view of the bay and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not in many cases be exchanged for the price of an inland lot in the same vicinity. In many cases doubtless the riparian rights incident to the ownership of the land were the principal if not sole inducement leading to its purchase by one and the reason for the price charged by the seller." - *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 75 Fla. 28,78,79 So. 491 (1918).
- 122 - See pp. 23-24, ante.
- 123 - See pp. 22-25, ante.
- 124 - See pp. 7-21, ante.
- 125 - See pp. 18-19, ante.
- 126 - New York statutes such as sec. 1230 of the Public Health Law and secs. 15-0501 to 15-0515 and 15-1501 to 15-1529 of the Environmental Conservation Law which have been in force for many years for the protection of lakes, streams and subterranean waters, contain no provisions which appear to be intended to safeguard either public or private interests in the preservation of natural beauty.
- 127 - Wild & Scenic Rivers Act of 1968, 16 USC, secs. 1271-1287, especially secs. 1271-2; Wild, Scenic and Recreational Rivers System Act, N.Y. Environmental Conservation Law, secs. 15-2701 to 15-2724, especially sec. 15-2701. An assumption that the New York legislature's omission from its wild river act of any provision for private suits was intentional rather than inadvertent finds support in the fact that all of the half dozen bills introduced in the 1971 legislative session to authorize private individuals to act in the public interest as private attorneys general failed of passage. As tending to justify New York's hesitation to enact such legislation see Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 Ecol. L.Q. 407 (1972).
- 128 - 42 USC, sec. 1857h-2. Other recent federal statutes containing similar provisions are the Water Pollution Control Act amendments of 1972 (Pub. L. 92-500, sec. 505) and the Noise Control Act of 1972 (Pub. L. 92-574). The wild rivers acts also clearly differ from sec. 810 (d) of the Civil Rights Act of 1968 which provides that under certain circumstances a person who believes himself aggrieved by a violation of the act may commence a civil action to enforce the rights granted by the act. Although in *Trafficante v. Metropolitan Life Ins. Co.*,

409 U.S. 205, 93 Sup. Ct. 364, 34 L. Ed. 2d 415 (1972), a suit brought by private parties to restrain alleged violations of the act by the defendant, the holding that the plaintiffs could obtain relief if their allegations of harm were sustained by the evidence purported to have been rendered in accordance with the law of standing, it could be argued that as the court pointed out that the plaintiffs were acting both on their own behalf and as private attorneys general, the court gave the plaintiffs more than mere standing to sue; that the court held by implication that the act had created private civil rights in individuals which were privately enforceable under the conditions existing in the case. But even if *Trafficante* be interpreted as so holding, it could scarcely be cited as authority for the proposition that the federal wild river act has impliedly created private rights to beauty and view in owners of land riparian to or commanding a view of a scenic river; for the principal basis for the court's implied holding in *Trafficante* was its conclusion that although the act was enforceable by the Attorney General, the members of his staff available for assignment to civil rights cases were so few that private complainants must be allowed to sue if the act were to be adequately enforced. While the ability of private persons to sue to vindicate private rights has, of course, a tendency in most instances to further the enforcement of any statute which has both private and public beneficiaries, the relative importance of private suits to the enforcement of the federal wild river act appears to be considerably less than the importance of such suits to the enforcement of the civil rights act.

- 129 - 10 Mich. Stat. Ann., sec. 41.528 (202). Comparable statutes are Conn.Genl.Stat. Ann., sec. 22a-16; Fla.Stat.Ann., sec. 403.412; Ind.Stat.Ann., sec. 3-3501; Mass.Genl.L., ch. 214, sec. 10A & Minn. Stat.Ann., sec. 116B.10.
- 129a - If it were held that a private plaintiff could recover damages under the Federal Clean Air Act for the harm he had suffered because the defendant had caused an air pollution prohibited by the act, such a holding would, of course, be tantamount to a decision that the act had created a privately enforceable right for the benefit of individual citizens. As taking the position that such a holding would be proper see Shaw, *Damage Claims in Pollution Actions Brought under Section 304 of the Federal Clean Air Act*, 13 Nat.Res.J. 510 (1973) at pp. 510-518.
- 130 - See Sax & Comer, *Michigan's Environmental Protection Act of 1970: a Progress Report*, 70 Mich.L.R. 1003, 1104 (1972).
- 131 - *Bazinsky v. Kesbec, Inc.*, 259 A.D. 467,470, 19 N.Y.S. 2d 716 (1940) affd. on other grounds, 286 N.Y. 655, 36 N.E. 2d 694 (1941); *Strauel v. Peterson*, 155 Neb. 448, 52 N.W. 2d 307 (1952) & *Stapleton v. Cohen* 353 Mass. 53, 228 N.E. 2d 64,6 (1967), cert. den., 391 U.S. 968 88 Sup. Ct. 2040, 21 L. Ed. 2d 881 (1968).

132 - *Amberg v. Kinley*, 214 N.Y. 531, 108 N.E. 830, LRA 1915E 519 (1915); *Texas and Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 9, 36 S. Ct. 482, 60 L. Ed. 874 (1916); *Reitmeister v. Reitmeister*, 162 F. 2d 691, 4 (1947) and *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). For a discussion of the creation by implication from a statute of rights not expressly provided for therein see *Shaw, Damage Claims in Pollution Actions Brought under Section 304 of the Federal Clean Air Act*, 13 Nat.Res.J. 510 (1973) at pp. 513-518.

See also *Assn. of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) & *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 156 (1970) in which the court, although talking in terms of the law of standing, based its decision that the plaintiffs possessed it on the fact that the interests they asserted were within or alleged to be within the zone of interests protected by the statutes involved. Thus, it could be argued, was tantamount to holding that the plaintiff in each case was suing to vindicate a right created by statute. That every plaintiff who can show that he such a statutory right has standing to sue to enforce it seems obvious. (See *Davis, The Liberalized Law of Standing*, 37 *Un.ofChic.L.R.* 450, 451 (1970) citing as an illustration *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 278 (1968).) The reasons for Professor Davis' election not to treat *Data* and *Barlow* as additional authorities sustaining this point are not entirely clear. The tenor of his discussion at pp. 452-456 is such as to suggest the possibility that his decision not to bracket them with *Hardin* was referable at least in part to the cryptic and elliptic character of the *Data* and *Barlow* opinions which makes it difficult for reasonable men to agree on an interpretation of those cases. (See comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 *Mich. L.R.* 450, 551, 568 (1971).) The standing recognized in *Hardin*, *Data* and *Barlow* might, in the language of Judge Breitel, be classified as substantive as distinguished from procedural. See *Hidley v. Rockefeller*, 28 N.Y. 2d 439, 443, 217 N.E. 2d 530, 322 N.Y.S. 2d 687 (1971). See also fn. 138, post.

In *Hanks & Hanks, An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act*, 24 *Rutg. L.R.* 230, 241 (1970) the following interpretation of *Data* appears: "The second step is to determine 'whether the interest sought to be protected...is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' The court of appeals would have had the plaintiff show a 'legal right' or a 'legally protected interest.' The Court rejected that approach and drew a sharp distinction between the standing issue - is the interest sought to be protected arguably within the zone of interests protected by the statute - and the issue on the merits - does the statute create a 'legally protected interest'." At 242 these authors add: Justice Brennan "fears that in applying the new test, courts will not be able

to draw a line of demarcation between the standing 'zone of interests protected' inquiry and the question of a 'legally protected interest' which goes to the merits:..." It is suggested that Justice Brennan's fear may be well justified, because it is indeed difficult to draw a line between two apparently identical things. It is also suggested that there is no cogent reason why this arduous task should be attempted.

- 133 - *Fine v. Philip Morris, Inc.*, 239 F. Supp. 361 (1964).
- 134 - *Di Caprio v. N.Y. Central Rr. Co.*, 231 N.Y. 94, 131 N.E. 746, 16 ALR 940 (1921); *Larrimore v. American Natural Gas Co.*, 184 Okla. 614, 89 P. 2d 340 (1939); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704, 163 ALR 324 (1945); *Circle Lounge & Grille, Inc., v. Brd. of Appeal of Boston*, 324 Mass. 427, 86 N.E. 2d 920, 3 (1949); *Riss v. City of New York*, 22 N.Y. 2d 579, 240 N.E. 2d 860, 293 N.Y.S. 2d 897 (1968), *Cross v. Brd. of Supervisors of San Mateo County*, 326 F. Supp. 634 (1968), *affd.* for reasons stated by Dist. Ct., 442 F. 2d 362, case 2 (1971) & *Breitweiser v. KMS Industries, Inc.*, 467 F. 2d 1391 (1972).
- 135 - As does N.Y. Public Health Law, sec. 1261.
- 136 - For the legislative history of the federal wild river act see 3 U.S. Code, Congressional & Administrative News (1968) 3802 et seq. As to the New York wild river act see Governor Rockefeller's legislative memorandum at p. A-245 of McKinney's N.Y. Laws of 1972. Relevant in this connection is the fact that the New York act was not added to Title 7 of the Environmental Conservation Law which deals with private rights in water, but was placed by itself in a new title 27 specifically created to receive it.
- 137 - For the reasons which make it unlikely that either the federal or the New York wild river act will be construed as creating private rights to beauty and view, it seems improbable that any of the following statutes will be held to have done so: Wilderness Act, 16 USC, secs. 1131-6, discussed and annotated in 14 ALR fed. 508 (1973); Estuarine Areas Act, 16 USC, secs. 1212-1226; National Trails System Act, 16 USC, secs. 1241-9; Water Bank Act, 16 USC, secs. 1301-1311; National Environmental Policy Act, 42 USC, secs. 4321-4347; N.Y. Environmental Conservation Law, secs. 1-0101, 3a and 3-0301, l, h, p; N.Y. Public Service Law (Siting of Major Utility Transmission Facilities and of Major Steam Electric Generating Facilities), secs. 120-130 & 140-149-b.
- 138 - 405 U.S. 727, 733-4, 92 Sup. Ct. 1361, 31 L. Ed. 2d 626 (1972). For a holding in accord with the quoted dictum see *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 683-690, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). In support of a decision enabling a private person to sue for the violation of a statutory public right if he can show that the violation will cause him harm, even though the statute creating the public right does not in terms purport

to create rights enforceable by private parties, it can be said that experience has shown that for various reasons governmental enforcement of legislation designed for the protection of the environment cannot always be counted upon. Only too often the public docilely accepts the mere enactment of a statute as sufficient satisfaction of its demand for environmental protection, and fails to insist that the executive branch of the government overcome its reluctance to increase the cost of production of goods and to alienate political campaign contributors by enforcing the statute. Even when the executive branch is really anxious to enforce, the unwillingness of the people to accept the taxation without which the costs of enforcement cannot be met may have put so low a ceiling on the size of the enforcement staff that only a fraction of the violators can be dealt with promptly and many may never be prosecuted at all. See Currie, *Trail Blazer-at-Law*, 5 *Trial* 23 (Aug. - Sept., 1969); note, *Private Remedies for Water Pollution*, 70 *Col.L.R.* 734, 5 (1970); comment, *Equity and the Eco-System*, 68 *Mich. L.R.* 1254, 1259-1260 (1970) and Bryson and Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 *Ecol.L.Q.* 241, 252 (1972).

- 139 - The federal wild river act makes it clear that in certain cases a riparian owner on a river designated as a component of the national wild and scenic rivers system may be allowed to retain ownership of or a life estate or an estate for 25 years in his riparian tract. (16 USC, sec. 1277). Although the New York wild river act does not expressly authorize such retention, its provisions with respect to permissible uses of land within wild, scenic or recreational river areas quite clearly contemplate continued private ownership of land within such areas in many instances. (Environmental Conservation Law, sec. 15-2709.)
- 140 - As to the scenic objectives under the federal wild river act see Tarlock and Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 *Corn. L.R.* 707, 722-3 (1970); and as to those objectives under the New York wild river act see Environmental Conservation Law, secs. 15-2701 and 15-2709.
- 141 - 36 *Barb.* 102, 127 (N.Y.Sup.Ct., Gen'l.Term, 1862). For comment on this case see pp. 4-5, ante.
- 142 - See pp. 27-28, ante.
- 142a - While sec. 101 (b) (2) of the National Environmental Policy Act (NEPA - 42 USC sec. 4331 (b) (2)) provides that it is the continuing responsibility of the Federal Government to assure for all Americans aesthetically pleasant surroundings, and while sec. 101 (c) (42 USC, sec. 4331(c)) states that "Congress recognizes that each person should enjoy a healthful environment," NEPA contains no express provision for the creation in individual citizens of privately enforceable rights to aesthetic surroundings, and does not even purport to empower private citizens to maintain actions against persons guilty of impairing the

natural beauty of the environment. For discussion as to whether NEPA should be interpreted as impliedly granting such a power and as creating such rights see Hanks & Hanks, *An Environmental Bill of Rights: the Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L.R. 230, 251, 269 (1970); Goldie, *Amenities Rights*, 11 Nat. Res.J. 274 (1971) and Goldie, *International Impact Reports*, 13 id. 256, 258-262 (1973).

In *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Comm.*, 449 F. 2d 1109 (1971) the court spoke of sec. 102 of the act (42 USC, sec. 4332) as creating duties. It did not, however, indicate whether any of the rights correlative to these duties were possessed by individual citizens and were enforceable by them for their own benefit. In *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F. 2d 289 (1972), cert. dim., 409 U.S. 1072, 93 S. Ct., 2749, 37 L. Ed. 2d 160 (1973), the court expressed disagreement at p. 297 with the statement of the court below that NEPA "falls short of creating the type of 'substantive rights' claimed by the plaintiffs" (325 F. Supp. 755 (1971)), and said at pp. 298-9 in support of its conclusion that the decision of the Corps of Engineers was reviewable: "...an administrative determination affecting legal rights is reviewable... Here, important legal rights are affected." It should be noted, however, that the court did not define the content of the legal rights impliedly granted by NEPA nor indicate whether they were public or private. Its omission to do so might well have been referable to its lack of any immediate need for such definition or indication; for under the court's approach to the reviewability question, if it could find the existence of any legal right whatever, it would have shown a basis for a power of review, regardless of whether the discovered right was public or private.

- 143 - Grad & Rockett, *Environmental Litigation - Where the Action is*, 10 Nat.Res.J. 742, 743-6 (1970); Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L.R. 1347, 1357 (1971); Goldie *Amenities Rights*, 11 Nat.Res.J. 274,7 (1971) and comment, *America's Changing Environment*, 50 Ford.L.R. 897, 901-2 (1972).
- 144 - Corker and Roe, *Washington's New Water Rights Law*, 44 Wash.L.R. 85, 128 (1968); note, *Aesthetic Nuisances*, 45 N.Y.Un.L.R. 1075, 1089-1901 (1970); Krier, *Environmental Watchdogs*, 23 Stan.L.R. 623 663 (1971) and Goldie, *Amenities Rights*, 11 Nat.Res.J. 274, 275-6 (1971) in which the author says: "The proposal here, by contrast, is whether... courts and legislatures have an opportunity of developing amenities rights directly ascribable to individuals. These could be framed so as to provide citizens with both the means of effective self-protection in the contemporary mass production, mass consumption and mass entertainment society, and the incentives, in addition to altruism or indignation, for utilizing those means to the full...To this writer the most significant advantage of the formulation of private law amenities rights would be their direct and decentralized effect..."

Amenities rights as a branch of private law could give the party harmed the right to pursue his remedy, rather than depend on the discretion of a bureaucrat."

While the following quotations from law review notes and comments deal with the problem of pollution control rather than with the protection of aesthetic interests, their applicability in the latter field seems clear. "There may, for example, be an instance of pollution that is minor in comparison with the emissions of major polluters, but which is nevertheless injurious to persons residing in the area affected by the pollution; in such cases, overworked state or federal agencies may not consider it appropriate to direct enforcement efforts to the solution of the problem. The availability of private relief in such a case would provide the aggrieved residents with a means of redress for the injuries which they were suffering." - *Equity and the Eco-System*, 68 Mich.L.R. 1254, 1260-1 (1970). "The need for individually designed equitable and compensatory relief does not end with the rise of parallel state agencies...private actions may fill gaps and provide individually tailored remedies where comprehensive pollution programs fail for lack of specificity." - *Private Remedies for Water Pollution*, 70 Col.L.R. 734, 750, 755 (1970). "There are those who are generally skeptical of the usefulness of the private nuisance action in the environmental context. This skepticism may well be justified if the perspective is regional or national and oriented toward systematic reform. However, within the broad context of that perspective, the private nuisance action may well provide a remedy to the individual whose situation was overlooked in the grand design." - *The Availability and Limitations of the Private Nuisance Doctrine in Wyoming*, 7 Land and Water L.R. 545, 558 (1972). See also Soper, *Private Remedies for Beachfront Property Damage*, 43 Miss.L.J. 516 (1972).

145 - *Water Policies for the Future* (Final Report Nat'l. Water Comn.) 271 (1973).

145a - But see fn. 138, ante.

146 - *Water Policies for the Future* (Final Report Nat'l. Water Comn.) 271-4 (1973).

147 - See p. 29, ante.

148 - That the state's sovereign power may be exercised in furtherance of recreational interests see the authorities cited in fn. 298, post.

149 - See *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437 (1923) and the discussion of it and other New York cases in *Colson, Title to Beds of Lakes in New York*, 9 Corn.L.Q. 288, 313 et seq. (1924) and in *Andrews Lands Under Water in New York*, 16 Corn.L.Q. 277, 282-3 (1931). See also the authorities cited in fn. 387, post.

150 - See fn. 40, ante.

151 - See p. 62, post.

152 - It should be noted in passing that the vulnerability to the state's sovereign power of private rights in lakes and streams, the beds of which are state owned, does not, of course, require the conclusion that private rights to beauty and view should not be created with respect to such bodies of water. Whether the state will elect to exercise its sovereign power over Cayuga Lake in the near future, or not until many years have passed, no one knows. It is, however, unnecessary to speculate as to the probabilities; for regardless of whether the state exercises its sovereign power over Cayuga Lake early or late, owners of land riparian to or commanding a view of it should possess private rights to beauty and view with respect to it, after as well as before such exercise, in order to protect their aesthetic interests in the lake against impairment by inconsiderate neighbors. (As to the advisability of creating such rights by statute see pp. 7-26, ante.) While such protection would usually be more effective prior to the state's exercise of its sovereign power than after it, a valuable fraction of its efficacy would survive such exercise because, in spite of it, the owners of land riparian to or commanding a view of the lake, could prevent private parties from adding to such impairment of beauty and obstruction of view as the state might have authorized.

153 - In New York it is possible for the ownership of the entire bed of a lake or stream to be in private hands, even though the body of water is navigable in fact, provided it is not tidal and so navigable in law. Hemlock Lake, situated near Rochester, affords an example of such a body of water. See Colson, Title to Beds of Lakes in New York, 9 Corn.L.Q. 159, 172, 308-9 (1924); Andrews, Lands under Water in New York, 16 Corn.L.Q. 277, 283-5 (1931); Chenango Bridge Co. v. Paige, 83 N.Y. 178, 185, 38 Am. Rep. 407 (1880); Smith v. City of Rochester, 92 N.Y. 463, 476, 44 Am. Re. 393 (1883) and Fulton, Light, Heat and Power Co., 200 N.Y. 400, 411-416, 94 N.E. 199 (1911).

154 - That apart from such a conveyance an owner of New York land riparian to a lake or stream having a privately owned bed would not possess the privilege of recreational boating, fishing or swimming except over the part of the bed owned by him (see pp. 78-9, post), even though the body of water is navigable, because in New York the navigation privilege does not include recreational activities. See Hooker v. Cummings, 20 Johns, Rep. 90, 97-9 (Sup. Ct., 1822); Peo. v. Doxtater, 75 Hun 472 (1894), affd. on opinion in Genl. Term, 147 N.Y. 723, 47 N.E. 724 (1895); Slingerland v. Int'l. Contracting Co., 43 A.D. 215, 220, 60 N.Y.S. 12 (1899), affd., 169 N.Y. 60, 61 N.E. 995, 56 LRA 494 (1901); Rockefeller v. Lamora, 85 A.D. 254, 9, 83 N.Y.S. 289 (1903); Granger v. City of Canandaigua, 257 N.Y. 126, 131, 177 N.E. 394 (1931); Fairchild v. Kraemer, 11 A.D. 2d 232, 204 N.Y.S. 2d 823 (1960); and Brant Lake Shores, Inc. v. Barton, 61 Misc. 2d 902, 7, 307 N.Y.S. 2d 1005 (Sup. Ct., 1970).

155 - See pp. 22-26, ante.

156 - See cases cited in fn. 295, post. While it is true that in *Smith v. City of Rochester*, 92 N.Y. 463, 44 Am. Rep. 393 (1883) the court referred to the state's possession of a sovereign power over Hemlock Lake, the bed of which it held to be in private ownership, the court was evidently not using the adjective "sovereign" in the sense in which the courts now use it. (As to current usage see p. 43 and authorities cited in fn. 211, post.) Thus the examples of the state's sovereign power which the court gave in *Smith* were the power of eminent domain and the power over navigation; and the court squarely held that the use of the water of Hemlock Lake for a public water supply without making compensation to harmed riparian owners could not be legalized by reference to the state's sovereign power as conceived of by the court. See pp. 474-484 of the official report.

The state's power over navigation would, of course, permit it to interfere with riparian rights without making compensation, provided the interference were in furtherance of navigation, even though the infringed riparian interests were in bodies of water the beds of which were privately owned. (*Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185, 38 Am. Rep. 407 [1880]; *Smith v. City of Rochester*, 92 N.Y. 463, 474-484 [1883] and *Fulton Light, Heat and Power Co.*, 200 N.Y. 400, 417-9, 94 N.E. 199 [1911].) The exercise of public recreational privileges do not, however, come within the scope of the navigation privilege in New York. See fn. 154, ante.

157 - See fn. 154, ante.

158 - And this would probably involve consideration of the question as to whether the state could extend a greater number of access privileges than its grantor B could have lawfully allowed. Although the plaintiffs might argue for a negative answer by pointing out that a grantor cannot convey a larger interest than he has (*I Amer. L.P.* 145 [1952]); 5 *Powell on Real Prop.* 392 (1971); *Fuller v. Arms*, 45 Vt. 400, 7 (1873); *Duckworth v. Watsonville Water and Light Co.*, 150 Cal. 520, 6, 89 P. 338 (1907) and *Taylor v. Armiger Body Shop*, 40 Del. Ch. 22, 172 A. 2d 572, 3 [1961]), it would not be surprising if a court should hold that while the state, because of this principle, acquired no greater licensing capacity from B than his power to grant a reasonable number of licenses, the number of persons which it would be reasonable for the state to invite might, because of the variability principle of the riparian doctrine (as to which principle see p. 21 & fn. 108, ante), be larger than the number which it would have been reasonable for B to invite during his ownership of the tract. Although the author has found no case which takes this position in explicit terms, there is language in *Lawrie v. Silsby*, 82 Vt. 505, 74 A. 94, 6 (1909); *United Paper Board Co. v. Iroquois Pulp and Paper Co.*, 226 N.Y. 38, 49, 123 N.E. 200 (1919) and *Smith v. Stanolind Oil and Gas Co.*, 179 Okla. 499, 172 P. 2d 1002, 1005-6 (1946) which could conceivably be construed as supporting it, and could readily be interpreted as consistent with it.

- 159 - As to these criteria see p. 12, ante and the list set forth in sec. 850B of Torts Restat. 2d (1971).
- 160 - As to the difficulty of determining reasonableness in such cases see pp. 20-21, ante.
- 161 - 178 N.Y. 270, 70 N.E. 799 (1904).
- 162 - See also *George v. Village of Chester*, 202 N.Y. 398, 401, 95 N.E. 767 (1911); *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 150 A. 60, 63-4 (1930) and *Petition of Clinton Water Dist.*, 36 Wash. 2d 284, 218 P. 2d 309, 312 (1950) in each of which the court, by holding that a riparian's recreational privileges, such as those of boating, fishing and swimming, are reasonable in extent, necessarily implied that it believed it to be practicable to apply a standard of reasonableness to private recreational as well as to private economic interests in lakes and streams.
- 163 - 119 So. 2d 305, 80 ALR 2d 1117 (Fla. Ct. of App., 1950).
- 164 - *Snively v. Jaber*, 48 Wash. 2d 815, 296 P. 2d 1015, 57 ALT 2d 560 (1956) is another case involving only private parties in which the court undertook to protect plaintiffs' enjoyment of their riparian recreational privileges from unreasonable interference by the riparian defendant.
- 165 - As Washington is one of the jurisdictions in which each riparian owner has the privilege at common law of extending his recreational activities over the entire lake, even though he owns only part of its bed (see fn. 373 post), the State of Washington, having acquired this privilege by becoming a riparian owner, could give its licensees legal access to all parts of the lake.
- 166 - 69 Wash. 2d 751, 420 P. 2d 352, 355-6 (1966).
- 167 - See in accord *Bartlett v. Stalker Lake Sportsmen's Club*, 283 Minn. 293, 168 N.W. 2d 356, 361 (1969). When the Michigan Supreme Court said in *Thompson v. Enz*, 385 Mich. 163, 188 N.W. 2d 579, 587 (1971) that "Whether or not owners such as the state, who put large numbers of people onto the lake will eventually reach the point where they burden the lake out of proportion to their frontage and will have to be restricted in their activity is not before the Court at this time. Boating wise, the state with 3 1/2 miles of shoreline, does not now appear to be casting an unreasonable burden on the lake (in other words on the other riparian owners)," the court indicated quite clearly that it believed that it had power in a proper case to restrict public social values in a lake for the protection of private owners of riparian land. Also pertinent here is the statement of the court in *St. Lawrence Shores, Inc. v. State of New York*, 60 Misc. 2d 74, 80, 302 N.Y.S. 2d 606 (Ct. of Cl., 1969) that "The State, as a riparian owner, except in the exercise of its police power, is subject to the same interpretation of rights and responsibilities as any other riparian owner."

- 168 - Indeed, a statement of one of the judges who participated in the decision of *Botton* could conceivably be interpreted as a dictum that a riparian owner has a right to beauty at common law which is defensible against the public. See the last part. of fn. 9, ante.
- 169 - See pp. 10-13, ante.
- 170 - See, for example, *George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 (1911); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. 2d 174 (1944); *Petition of Clinton Water Dist.*, 36 Wash. 2d 284, 218 P. 2d 309 (1950) & *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825 (1967). *Petraborg* & *Collens* have particular significance here, because they may well be interpreted as involving not only boating, fishing and swimming privileges, but aesthetic interests as well. See the 3d par. of fn. 9, ante.
- 171 - See pp. 71-74, post.
- 172 - 3 Farnham, *Law of Waters*, sec. 723 (1904); 2 Tiffany on Real Prop. (3d ed.) 724 (1939); 5 Powell on Real Prop. 393 (1971); *Hanford v. St. Paul & Duluth Rr. Co.*, 43 Minn. 104, 44 N.W. 1144, 8 (1890); *Walz v. Bennett*, 95 Conn. 537, 111 A. 834, 6 (1920); *Holmes v. Nay*, 186 Cal. 231, 199 P. 325, 8 (1921); *Matter of City of New York (W. 250th St.)*, 240 N.Y. 68, 72, 147 N.E. 361 (1925); *Sawyer v. Shader*, 321 Mass. 725, 75 N.E. 2d 647, 9 (1947) & *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E. 2d 678, 682 (1965).
- 173 - *Lawrence v. Whitney*, 115 N.Y. 410, 423, 22 N.E. 174, 5 LRA 417 (1889).
- 174 - *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N.E. 774, 7 (1890).
- 175 - The existence of such privileges and rights was affirmed or recognized in the following cases: *George v. Village of Chester*, 202 N.Y. 398, 95 N.E. 767 (1911); *State v. Morse*, 84 Vt. 387, 80 A. 189, 34 LNS 190 (1911); *Willis v. Wilkins*, 92 N.H. 400, 32 A. 2d 321 (1943); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. 2d 174 (1944); *Florio v. State of Florida*, 119 S. 2d 305, 80 ALR 2d 1117 (Fla. Ct. of App., 1950); *Harris v. Brooks*, 225 Ark. 436, 283 S.W. 2d 129, 54 ALR 2d 1440 (1955); *Bino v. City of Hurley*, 273 Wis. 10, 76 N.W. 2d 571, 56 ALR 2d 778 (1956); *Botton v. State*, 69 Wash. 2d 751, 420 P. 2d 352 (1966); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A. 2d 825 (1967) & *Thompson v. Enz*, 385 Mich. 163, 188 N.W. 2d 579 (1971).
- 176 - See the last line of the quotation from the Commission's statement at p. 30, ante.
- 177 - Clark, *Real Covenants & Other Interests Running with Land* (2d ed.) 78 (1947) & note, 47 Corn.L.Q. 676, 9 (1962).

- 178 - Prop. Restat., com. e to sec. 492 (1944).
- 179 - That the benefit of a covenant in a deed obligating the grantee not to use the land except for certain specified purposes is enforceable by a person to whom the coventantee has conveyed the land see II Amer. L. Prop. 590-1 (1952) & 5 Powell on Real Prop. 207 & 217 (1971). That the same result is reached with respect to rights to beauty and view created by contract or grant see *Mitchell v. Reid*, 192 N.Y. 255, 85 N.E. 65 (1908) & *Ford v. Miles*, 93 Conn. 222, 105 A. 443 (1919). And there would seem to be no reason why the courts should deny similar treatment to such interests when they are added to an estate in land by statute.
- 180 - The result would be the same if the court should hold that the recommended statute created appurtenant easements of beauty and view rather than true riparian rights which would become constituent elements of estates in the land they benefitted, because easements appurtenant to an estate are not only transferable with it, but automatically pass to a grantee thereof or successor thereto unless the deed clearly provides to the contrary. See Clark, *Real Covenants & Other Interests Running with Land* (2d ed.) 65 (1947); 3 Tiff on Real Prop. (3d ed.) 212-3 (1939); II Amer. L. Prop. 283 (1952); *Cadwalader v. Bailey*, 17 R.I. 495, 23 A. 20, 3, 14 LRA 500 (1891) & *Chambersburg Shoe Mfg. Co. v. Cumberland Valley Rr.*, 240 Pa. 519, 87 A. 968, 970 (1913).
- 181 - See *Hanford v. St. Paul & Duluth Rr. Co.*, 43 Minn. 104, 42 N.W. 596, 44 N.W. 1144, 7 LRA 722 (1890); *Lawrie v. Silsby*, 76 Vt. 240, 56 A. 1106 (1904), 82 Vt. 505, 74 A. 94 (1909); *State v. Apfelbacher*, 167 Wis. 233, 167 N.W. 244 (1918); *City of New York v. Third Ave. Ry.*, 294 N.Y. 238, 244-5, 62 N.E. 2d 52 (1945); *Smith v. Stanolind Oil & Gas Co.*, 179 Okla. 499, 172 P. 2d 1002, 5 (1946); *Federal Power Comn. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246-7, 74 S. Ct. 487, 98 L. Ed. 666 (1953); *Mayer v. Grueber*, 29 Wis. 2d 168, 138 N.W. 2d 197, 203-4 (1965) & *Bartlett v. Stalker Lake Sportsmen's Club* 283 Minn. 293, 168 N.W. 2d 356, 361 (1969).

Although chap. 41 of Torts Restat. 2d, (1971) which deals with riparian rights, does not expressly declare or even state in substance that such rights are severable by conveyance or reservation from the estate in riparian land of which they are component parts, the discussion of secs. 856 & 857 and their comments at the 1971 meeting of the ALI affords some evidence that those present were assuming that one of the effects of these sections was to indicate the severability of riparian rights from the estate which originally comprised them. See pp. 110-148 of the Proceedings of the 48th Annual Meeting of the ALI. However, as was duly noted during discussion at the meeting, there is authority contrary to the Restatement position. See, for example, *Gould v. Eaton*, 117 Cal. 539, 543, 49 P. 577 (1897).

- 182 - 226 N.Y. 38, 46-7, 123 N.E. 200 (1919). Other cases in which an attempted severance of a riparian privilege by conveyance was held to be successful, and in which the grantee had some interest in land for the benefit and enjoyment of which the privilege could be exercised are *Hanford v. St. Paul & Duluth Rr. Co.*, 43 Minn. 104, 44 N.W. 1144, 7 LRA 722 (1890) and *Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 246-7, 74 S. Ct. 487, 98 L. Ed. 666 (1953).
- 183 - 205 Va. 909, 140 S.E. 2d 678, 682 (1965). Substantially in accord is *Risien v. Brown*, 73 Tex. 135, 10 S.W. 661 (1889).
- 184 - 43 Minn. 104, 44 N.W. 1144, 7 LRA 722 (1890).
- 185 - 43 Minn. 104, 44 N.W. 1144, 5, 7 LRA 722 (1890).
- 186 - *Lake Shore & M.S. Rr. v. Platt*, 53 Oh. St. 254, 41 N.E. 243, 5 (1895).
- 187 - See also in accord *Farnham, The Law of Waters* 2197 & 2201 (1904). Analogical support for the above analysis is afforded by *Mitchell v. Leavitt*, 30 Conn. 587 (1862) in which it was held that an attempt to sever the benefit of a covenant prohibiting construction of a mill on tract X by a reservation of that covenant in a deed of tract Y, for the benefit of which the covenant had been exacted, was void as against public policy where neither the public nor the grantor of tract Y could derive benefit from the enforcement of the covenant which he had attempted to reserve.
- 188 - *Plager, Law of Water Allocation*, 1968, Wis.L.R. 673, 681-2; *Edwards v. Allouez Mining Co.*, 38 Mich. 46 (1878); *Haber v. Paramount Ice Corp.*, 239 A.D. 324, 267 N.Y.S. 349, *affd.*, 264, N.Y. 98, 190 N.E. 163 (1934) and *Johnson v. Killian*, 157 Fla. 754, 27 So. 2d 345 (1946).
- 189 - Among the New York cases so holding are *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 2d 203, 27 ALR 1141 (1923) and *Great Atlantic and Pacific Tea Co., Inc. v. N.Y. World's Fair 1964-1965 Corp.*, 42 Misc. 2d 855, 859-860, 49 N.Y.S. 2d 256 (Sup. Ct., 1964).
- 190 - See *Matter of Huie*, 22 Misc. 2d 1028, 192 N.Y.S. 2d 620 (Sup. Ct., 1959), *affd.*, 11 A.D. 2d 837, 202 N.Y.S. 2d 954 (1960) and *Chamberlain v. Hazzard*, 37 A.D. 2d 1022, 324 N.Y.S. 2d 705 (1971). Although riparian interests are severable in New York and in Michigan they are not, the probable construction of this instrument in each state would be the same. See *Thompson v. Enz*, 379 Mich. 667, 154 N.W. 2d 473, 483 (1967).
- 191 - *Prop. Restat.*, sec. 486 (1944); 3 *Tiff. on Real Prop.* (3d ed.) 351-2 (1939); II *Amer. L. Prop.* 279 (1952).
- 192 - Easements are presumed to be appurtenant rather than in gross (3 *Tiffany on Real Prop.* (3d ed.) 207-9 (1939) and *Wilson v. Ford*, 209 N.Y. 186,

196, 102 N.E. 614 (1913); and there is nothing in the supposed grant or circumstances to rebut this presumption.

- 193 - This would appear to be the logical result in view of the distinction between easements and natural interests of which the riparian swimming privilege would clearly seem to be one. See Bigelow, *Natural Easements* 9 Ill.L.R. 540 (1915) especially at 545-550 & 3 Tiffany on *Real Prop.* (3d ed.), sec. 714 (1939). But cf. II *Amer. L. Prop.*, secs. 8.108.4 (1952).
- 194 - See p. 38, ante.
- 195 - It seems probable, however, that when dealing with severed riparian privileges, as when dealing with easements, the court would start with the assumption that the grantor could continue swimming to any extent which did not interfere unreasonably with his grantee's swimming; and it is not certain that the court would decide that the language employed pointed with sufficient clarity to an exclusive privilege to overcome the presumption against exclusiveness.
- 196 - As in the hypothetical case put at p. 41, ante.
- 197 - While there appears to be no clear judicial authority for this idea, *Kentucky Pipe Line Co. v. Hatfield*, 223 Ky. 315, 3 S.W. 2d 654 (1928) could conceivably be interpreted as supplying it.
- 198 - See *Prop. Restat.*, sec. 492 and comments (1944); 3 Tiffany on *Real Prop.* (3d ed.) 210-2 (1939) and II *Amer. L. Prop.* 8.71-8.83 (1952) with special emphasis on fn. at pp. 291-6.
- 199 - See p. 42, ante.
- 200 - See p. 38, ante.
- 201 - See p. 41, ante.
- 202 - See *Prop. Restat.*, sec. 492 and comments (1944) and p. 43, ante.
- 203 - What has been said herein in regard to attempts by A to effect a severance of his riparian swimming privilege from the estate comprising it by a transfer of all or part of that privilege by the grant of swimming easements or of the riparian privilege itself would seem to be applicable to attempts by A to effect such a severance by reserving for himself a swimming easement or the riparian privilege of swimming when conveying his riparian tract.
- 204 - See pp. 37-44, ante.
- 205 - The question as to whether such rights to beauty and view should and would be held to pass with a deed of the estate in land which comprised them has already been discussed and answered in the affirmative. See pp. 37-38, ante.

- 206 - Even if A buys another tract in the vicinity, he still would not be able to show that he would derive legitimate benefit from possession of the severed rights; for their enforcement would protect the prospect from his original tract which he no longer owns rather than the prospect from his newly acquired tract. Moreover, in many instances he would have no reason to rely on the rights incident to the first tract to provide protection for the second, as it would have such rights incident to it when he acquired it.
- 207 - See p. 40, ante.
- 208 - The question here is like that which arises when the owner of land to which an easement is appurtenant attempts to sever it by reservation, although severance was not authorized by the grantor of the easement. See Prop. Restat., sec. 487 and com. b (1944) and Clark, Real Covenants and Other Interests which Run with Land (2d ed.) 89 (1947).
- 209 - 3 Tiffany on Real Prop. (3d ed.) 213-4 (1939) and Clark, Real Covenants and Other Interests which Run with Land (2d ed.) 89 (1947). That an appurtenant easement can be severed, however, if the creating grantor so provided in the deed see Prop. Restat., sec. 487 and com. b and II Amer. L. Prop., sec. 8.73 (1952).
- 210 - *Kernochan v. N.Y. Elevated Rr. Co.*, 128 N.Y. 559, 568, 29 N.E. 65 (1891); *Shepard v. Manhattan Ry. Co.*, 169 N.Y. 160, 165-6, 62 N.E. 151 (1901); *Western Union Telegraph Co. v. Shepard*, 169 N.Y. 170, 9, 62 N.E. 154, 58 LRA 115 (1901) and *McKenna v. Brooklyn Union Elevated Rr. Co.*, 184 N.Y. 391, 6, 77 N.E. 651 (1906).
- 211 - See Prop. Restat., sec. 452 and comments (1944).
- 212 - 10 McQuillin, Law of Municipal Corps. (3d ed., 1966 revised vol.) 788 and *Lahr v. Metropolitan Elevated Rr. Co.*, 104 N.Y. 268, 291, 10 N.E. 528 (1887).
- 213 - See p. 22, ante.
- 214 - See cases cited in fn. 210, ante.
- 215 - See p. 41, ante.
- 216 - While it is said in II Amer. L. Prop., sec. 8.73 (1952) that an attempt to sever an easement appurtenant will result in its extinguishment, only two cases are cited in support of that proposition, and one of them (*Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760 [1858]) does not seem to be in point. The New York elevated railway cases, on the other hand, supply examples of situations in which the nullity alternative rather than the extinguishment option was chosen. This choice is defended in Clark, Real Covenants & Other Interests which Run with Land (2d ed.)

89 (1947). As there appeared to be no basis for finding an intention to abandon the easements in any of these cases (see those cited in fn. 210, ante), and as extinguishment of the easements would have resulted in a windfall for the elevated railways, Clark's approval seems clearly justified.

- 217 - Even in California where riparian rights may not be conveyed apart from the riparian land to which they are incident, they may be released. (Bingham, California Law of Riparian Rights, 22 Cal.L.R. 251, 268 (1934).) And releases as distinguished from conveyances may, of course, be resorted to in jurisdictions which permit the severance of riparian interests from riparian land by reservation or conveyance. (Torts Restat. 2d, sec. 856, last par. of com. c (1971).)
- 218 - As indicating that rights to beauty and view may be so created see the cases cited in fn. 6, ante.
- 219 - Water Policies for the Future (Final Report Nat'l. Water Comn.) 271 (1973).
- 220 - As to the attention which has been given in Alaska to the public interest in the recreational values of her waters see Trelease, Alaska's New Water Use Act, 2 Land and Water L.R. 1,48 (1967) in which he says: "where public recreation and fish and game resources do provide the best use of water, they will receive protection under the Act by denial or conditioning of appropriation permits in the public interest. Alaska now has more legal protection for its sportsmen and nature lovers than perhaps any other state." The environmental protection laws which have been enacted in the last few years in the west as well as in the east should, of course, afford considerable protection to the public interest in the recreational and aesthetic values of lakes and streams.
- 221 - Except in Washington. See the quotation from and the comment on the Botton case at pp. 34-6, ante.
- 222 - Water Policies for the Future (Final Report Nat'l. Water Comn.) 557-8 and 561 (1973).
- 223 - See p. 30, ante.
- 224 - Water Policies for the Future (Final Report Nat'l. Water Comn.) 272 (1973).
- 225 - As to this immunity see pp. 3-5, ante.
- 226 - That the section should and probably will be so interpreted see pp. 10-12, ante.
- 227 - It has often been recognized that a deprivation of only a part of the rights, privileges, powers and immunities which are comprised in

ownership may amount to a taking of property within the meaning of that phrase as used in connection with the due process clauses found in Art I, sec. 6 of the New York Constitution and in the 5th and 14th amendments to the federal constitution. See Kratovil & Harrison *Eminent Domain - Policy & Concept*, 42 Cal.L.R. 596, 601 and 608 (1954); Kauper, *Civil Liberties and the Constitution*, 118 (1962); 11 McQuillin, *Munic. Corps.* (3d ed. rev.), sec. 32.26 (1964); Waite, *Governmental Power and Private Property*, 16 Cath.Un.of America L.R. 283, 292 (1967); Van Alstyne, *Statutory Modification of Inverse Condemnation*, 19 Stan.L.R. 727, 770 (1967); Palmore, *Damages Recoverable in a Partial Taking*, 21 Southwest.L.J. 740 (1967) and Netherton, *Implementation of Land Use Policy*, 3 Land and Water L.R. 33, 9 (1968).

The following explanation of this position is quoted from *Matter of City of New York (East River Drive)*, 264 A.D. 555, 564, 35 N.Y.S. 2d 990 (1942), *affd. w.o.*, 273 A.D. 884, case 3, 78 N.Y.S. 2d 364 (1948), *affd. w.o.*, 298 N.Y. 843, 84 N.E. 2d 148 (1949): "...the real property itself, i.e., the land, the corporeal substance or part of the earth affected, is not 'taken' or destroyed. After the so-called 'taking' it is still there. More accurately, what is 'taken', i.e., what is completely or partially destroyed or lessened, is a private right in the land, either the right to the fee, the entire title, or something less, e.g., riparian rights or easements, or any other rights referred to in the Charter section above as 'Real Property.' But in each case, to the actual extent that such rights are invaded, lessened or completely destroyed, there is in contemplation of law a 'taking,' and that taking is in fact by its operation and effect a direct injury to the owner in his property rights and a diminution of his rights of user." See also *Bino v. City of Hurley*, 273 Wis. 10, 76 N.W. 2d 571 (1956).

- 228 - Kratovil and Harrison, *Eminent Domain - Policy and Concept*, 42 Cal. L.R. 596, 608 (1954); note 3 Stan.L.R. 361, 2, fn. 5 (1951); 11 McQuillin, *Munic. Corps.* (3d ed. rev.), sec. 36.26 (1964); Licterman, *Rights and Remedies of a New York Landowner for Losses Due to Government Action*, 33 Alb.L.R. 537, 546 (1969); *Noble State Bank v. Haskell*, 219 U.S. 104, 110, 31 S. Ct. 186, 55 L. Ed. 112, 32 LNS 1062 (1911); *Peo. ex rel. Durham Realty Corp. v. La Fetra*, 230 N.Y. 429, 443, 130 N.E. 601, 16 ALR 152, *app. dismiss.*, 257 U.S. 665, 42 S. Ct. 47, 66 L. Ed. 424 (1921); *O'Hara v. Los Angeles County Flood Control Dist.*, 19 Cal. 2d 61, 119 P. 2d 23 (1941); *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 291 P. 2d 764, 8 (1955); *N.Y. State Thruway Authority v. Ashley Motor Court, Inc.*, 10 N.Y. 2d 151, 7, 176 N.E. 2d 566, 218 N.Y.S. 2d 640 (1961); *Moore v. Ward*, 377 S.W. 2d 881, case 2, 855 (Ky. Ct. of App., 1964) and *Markham Advertising Co. v. State of Washington*, 73 Wash. 2d 405, 439 P. 2d 248, 261 (1968), *app. dismiss. for want of substantial federal question and reh. den.*, 393 U.S. 316, 1112, 89 S. Ct. 553, 854, 21 L. Ed. 2d 512, 813 (1969).

- 229 - Brown, Due Process of Law, 40 Harv. L.R. 943, 966 (1927); Kratovil and Harrison, Eminent Domain - Policy and Concept, 42 Cal. L.R. 596, 609 (1958); Haber and Bergen, Water Allocation in the Eastern U.S. (chap. by Fisher) 448 (1958); Dunham, A Legal and Economic Basis for City Planning, 58 Col. L.R. 650, 663-9 (1958); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L.R. 692 (1960); O'Connell, Iowa's New Water Statute, 47 Ia. L.R. 549, 615 (1962); Sax, Takings and the Policy Power, 74 Yale L.J. 36, 67 (1964); Trelease, Policies for Water Law, 5 Nat. Res. J. 1, 35 (1965); Michelman, Property, Utility and Fairness, 80 Harv. L.R. 1165, 1223, 1233, (1967); Van Alstyne, Statutory Modification of Inverse Condemnation, 19 Stan. L.R. 727, 761 (1967); Hines, A Decade of Experience under the Iowa Water Permit System, 8 Nat. Res. J. 23, 43-5 (1968); Netherton, Implementation of Land Use Policy, 3 Land and Water L.R. 33, 43 (1968); Plager and Maloney, Emerging Patterns for Regulation of Consumptive Use of Water in the Eastern U.S., 43 Ind. L.J. 383, 6 (1968); Kates, Georgia Water Law, 67-8 (1969); J.D. Ellis, Modification of the Riparian Theory and Due Process in Missouri, 34 Mo. L.R. 562, 571 (1969); Garton, Ecology and the Police Power, 16 S. Dak. L.R. 261, 263-7 (1971); Pa. Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922); Bacich v. Brd. of Control, 23 Cal. 2d 343, 144 P. 2d 818, 826 (1943); Shepard v. Village of Skaneateles, 300 N.Y. 115, 8, 89 N.E. 2d 619 (1949); Vermont Woolen Corp. v. Ackerman, 112 Vt. 219, 167 A. 2d 533 (1961); Moore v. Ward, 377 S.W. 2d 881, case 2 (Ky. Ct. of App., 1964); Dooley v. Town Plan and Zoning Comm., 151 Conn. 304, 197 A. 2d 770 (1964); Grossman v. Baumgartner, 17 N.Y. 2d 345, 218 N.E. 2d 259, 217 N.Y.S. 2d 195 (1966) and Hughes v. State of Washington, 389 U.S. 290, 294-8, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967).
- 230 - Although Professor Sax has withdrawn from the first branch of this criterion, the support which he had accorded it in his 1964 article cited in the preceding footnote (see Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, [1971] especially at p. 150, fn. 5), it seems unlikely that the courts will abandon it. For one thing, as Professor Sax correctly pointed out at pp. 66-70 of his 1964 article, the criterion here referred to would "leave the majority of current holdings intact." (As to such holdings see pp. 14-15 and fns. 66, 68 and 74, ante.) Moreover, it seems probable that the courts would be reluctant to cause the disruption and unfair surprise which would be the consequence of the substitution of a new criterion for one upon which people had long since become accustomed to rely. For further comment on Professor Sax's second thoughts see the 2d par. of fn. 253, post.
- 231 - For comment on the value of several of the criteria which the courts have applied when determining whether a statute constitutes a valid exercise of the police power see Harnsberger, Eminent Domain and Water Law, 48 Neb. L.R. 325, 342-354 (1969). At pp. 353-4 he says: "...the final determinations will ultimately depend, as they should, upon the

value judgments of the judges rather than on any single formula which points to one choice over another...The Court is not apt to adopt any fixed standard which would remove the factor of balancing the interests of the public against the harm to the individual in each situation."

- 232 - Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S. Ct. 529, 52 L. Ed. 828 (1908); Peo. ex rel Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 442, 130 N.E. 601, 16 ALR 152, app. dismiss., 257 U.S. 665, 42 S. Ct. 47, 66 L. Ed. 424 (1921); Village of Euclid v. Ambler, 272, U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303, 54 ALR 1016 (1926); Berman v. Parker, 348 U.S. 25, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954) Farley v. Graney, 146 W. Va. 22 119 S.E. 2d 833, 843 (1960) and Goldblatt v. Town of Hempstead, 369 U.S. 590, 4, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).
- 233 - 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).
- 234 - In 260 U.S. at 413 Justice Holmes said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts." And at p. 415 Justice Holmes added: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Among the recent cases in which the Holmes doctrine was applied are Goldblatt v. Town of Hempstead, 369 U.S. 590, 4, 82 S. Ct. 987 8 L. Ed. 2d 130 (1962); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Comm., 11 Cal. App. 3d 557, 570-3, 89 Cal. Rptr. 897 (1970); State v. Johnson, 265 A. 2d 711, 715-7, 46 ALR 3d 144 (Me. Sup. Ct., 1970); Potomac Sand and Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A. 2d 241, 247-8, cert. den., 409 U.S. 1040, 93 Sup. Ct. 525, 34 L. Ed. 2d 490 (1972); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761, 7 (1972) and In re Spring Valley Development, 300 A. 2d 736, 751 (Me. Sup. Ct., 1973).

While in Bosselman, Callies and Banta, The Taking Issue (an analysis of the constitutional limits of land use control, prepared for the Council on Environmental Quality) (1973) it is said at p. 138 that Pa. Coal Co. v. Mahon "has now become so well accepted that...it has passed into black letter law," and at p. 328 that "There is little historical basis for the idea that a regulation of the use of land can constitute a taking of the land," these statements seem rather

broad, particularly in view of the fact that none of the cases which are cited in fn. 228, ante, as supporting the view that the destruction of even a few of a property owner's rights and privileges constitutes a pro tanto taking of his property are included in the table of cases appearing at p. viii of *The Taking Issue*; a circumstance which afford some basis for the inference that these authors did not take the omitted cases into account. It is true, of course, that Mahon embodies the majority position, but it is not clear that the majority is so great as to justify the classification of the Mahon doctrine as blackletter.

235 - As to these criteria see p. 50, ante.

236 - Thus all of the cases cited in fn. 234 as following the Holmes doctrine employ one or more of the criteria listed at p. 50, ante, as do all of the cases cited in fn. 228 as maintaining the position that although a minor impairment of a private property interest may constitute a taking of property, this does not automatically render it compensable.

237 - See p. 49, ante.

238 - That at common law the privilege of use is a constituent element of the ownership of land see Bigelow, *Natural Easements*, 9 Ill. L.R. 541,3 (1915: *Matter of Application of Jacobs*, 98 N.Y. 98, 105, 50 Am. Rep. 636 [1885] and *Sandyford Park Civic Assn. v. Lunneman*, 396 Pa. 537, 152 A. 2d 898, 900 [1959]). That the privilege of use cannot be taken without due process of law see *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976, 18 LRA 543 (1893).

239 - As to the existence of this common law immunity in New York see pp. 2-4, ante.

240 - As to limitations on the police power created by the first amendment to the U.S. constitution see pp. 71 et seq., post.

241 - See pp. 10-13, ante.

242 - See pp. 12-15, ante.

243 - The possibility of such a capital loss in the event of legislative abolition of unexercised consumptive riparian privileges is recognized in the following passage in Trelease, *A Model Water Code*, 22 Law and Contemp. Probs. 391, 319 (1957): "And it is admitted that these rights may have real value, as representing claims to a future water supply; they may even represent actual investment, if riparian land has been purchased at a price which includes the potential value of the undeveloped rights." It would seem that this comment would also be applicable to the legislative abolition of other kinds of unexercised privileges of ownership, such as the common law privilege to erect structures or to do acts impairing or obstructing the view of natural beauty; and regardless of whether the tract in question was riparian.

- 244 - See p. 15 and fn. 73, ante.
- 245 - See pp. 8 and 23, ante.
- 246 - See p. 8, ante.
- 247 - Nettleton, Implementation of Land Use Policy, 3 Land and Water L.R. 33, 7 (1968) and 6 Powell on Real Prop. 115 (1971).
- 248 - Of course the owner of an enterprise which is not a regulated public utility might find expensive modification of design in the interests of aesthetics less practicable than would such a utility. The latter could presumably include the amount spent in the construction of an aesthetically acceptable plant as invested capital on which it had a right to a reasonable return (Burdick, Law of the American Constitution, sec. 272 (1922); *Smyth v. Ames*, 1969 U.S. 466, 523, 18 S. Ct. 418, 42 L. Ed. 819 (1898); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 41, 29 S. Ct. 192, 53 L. Ed. 382 (1909) and *N.A.A.C.P. v. Pa. Public Utilities Comn.*, 5 Pa. Comn. 312, 290 A. 2d 704, 7 (1972)); and certainly could do so if the construction of such a plant were required by the utility's license. A private operator, on the other hand, might not be able to bear the extra construction cost unless his competitors found themselves forced to invest an equal amount of capital.
- 249 - Relevant in this connection is *Poneleit v. Dudas*, 141 Conn. 413, 106 A. 2d 479 (1954) in which a flood plain zoning ordinance was upheld as a valid exercise of the police power despite the fact that the effect of its enforcement was substantially to curtail the common law riparian privileges which the defendants would have enjoyed as riparian owners except for the ordinance.
- 250 - 1 Rathkopf, Law of Zoning and Planning (3d ed.) 6-6 (1966); 6 Powell on Real Prop., sec. 867, p. 116 (1971); Welsh, The Wetlands Statutes: Regulation or Taking, 5 Conn. L.R. 64, 86 (1972); Kusler, Open Space Zoning: Valid Regulation or Taking, 57 Minn. L.R. 1, 35 (1972); *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 6, 15 N.E. 2d 587, 117 ALR 1110 (1938); *Vernon Park Realty, Inc. v. City of Mt. Vernon*, 307 N.Y. 493, 121 N.E. 2d 517 (1954); *Dooley v. Town of Plan and Zoning Comn.*, 151 Conn. 304, 197 A. 2d 770 (1964); *Stevens v. Town of Huntington*, 20 N.Y. 2d 352, 229 N.E. 2d 591, 283 N.Y.S. 2d 16 (1967); *Fulling v. Palumbo*, 21 N.Y. 2d 30, 233 N.E. 2d 372, 286 N.Y.S. 2d 249 (1967); *Schwartz v. Lee*, 22 N.Y. 2d 742, 239 N.E. 2d 216, 292 N.Y.S. 2d 123 (1968) and *Salamar Builders Corp. v. Tuttle*, 29 N.Y. 2d 221, 275 N.E. 2d 585, 325 N.Y.S. 2d 933 (1971).
- 251 - As approving the resort to the analogy between zoning ordinances and legislation modifying interests with respect to water when considering the ability of the latter to qualify as a valid exercise of the police power see Beuscher, Appropriation Water Law Elements in Riparian Doctrine States, 10 Buf. L.R. 448, 458 (1961); O'Connell, Iowa's New Water Statute, 47 Ia. L.R. 549, 596, 604 (1962); California-Oregon

Power Co. v. Beaver Portland Cement Co., 73 F. 2d 555, 567 (1934),
affd. on other grounds 295 U.S. 142, 55 S. Ct. 725, 95 L. Ed. 1356
(1935) and Iowa Natural Resources Council v. Van Zee, 261 Ia. 1287,
158 N.W. 2d 111, 8 (1968).

- 252 - "The police power is not to be limited to guarding merely the physical or material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved; not for its use but for its beauty." - Barrett v. State of New York, 220 N.Y. 423, 116 N.E. 99, LRA 1918C 400 (1917). This passage was quoted with approval in A.E. Nettleton Co. v. Diamond, 27 N.Y. 2d 182, 192-3 264 N.E. 2d 118, 315 N.Y.S. 2d 625 (1970), app. diss. for want of a substantial federal question sub nom. Reptile Products, Assn., Inc. v. Diamond, 401 U.S. 969, 91 S. Ct. 1201, 28 L. Ed. 2d 319 (1971). See also Note, Aesthetics and Objectivity, 71 Mich. L.R. 1438, 1457 (1973) and pp. 8 and 23, ante. That the public interest in the enjoyment of scenic values can be protected by exercise of the police power, see In re Spring Valley Development, 300 A. 2d 736, 751 (Me. Sup. Ct., 1973). It would seem that private interests in such enjoyment would also be protectible by that power in view of the public interest in the satisfaction of legitimate desires entertained by numerous citizens. See pp. 15-16, ante.
- 253 - Dunham, A Legal and Economic Basis for City Planning, 58 Col. L.R. 650, 666-9 (1958); Sax, Takings and the Police Power, 74 Yale L.J. 36, 69 (1964); J.D. Ellis, Modification of the Riparian Theory and Due Process in Missouri, 34 Mo. L.R. 562, 572 (1969); Rideout v. Knox, 148 Mass. 368, 373-4, 19 N.E. 390, 2 LRA 81 (1889); Camfield v. U.S., 167 U.S. 518, 523-4, 17 S. Ct. 866, 42 L. Ed. 261 (1896); Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 343, 349-350, 87 N.E. 504, 23 LNS 436 (1909); Peo. v. N.Y. Carbonic Acid Gas Co., 196 N.Y. 421, 435, 90 N.E. 441 (1909) and Nelson v. De Long, 213 Minn. 425, 7 N.W. 2d 342, 8 (1942).

Although Professor Sax has recently announced a modification of the views he expressed in the article by him which is cited in the preceding paragraph of this footnote as to the tests which should be applied when deciding whether a statute qualifies as a valid exercise of the police power (see Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971) especially at p. 150, fn. 5), his revised views seem to be consistent rather than in conflict with the cases supporting the position that a statute designed to effect an equitable adjustment of the privileges and rights of private landowners inter se can be a valid exercise of the police power as well as with the proposition that the fact that a statute has such a purpose should be recognized as a circumstance tending to establish its validity as a police power measure. For previous comment herein on Professor Sax's 1971 views see fn. 230, ante.

- 254 - Mixon, Zoning for Diversity, 62 N.W. Un. L.R. 314, 348 (1967);
Leighty, Aesthetics as a Legal Basis for Environmental Control, 17

Wayne L.R. 1347, 1373, 1381, 1392 (1971); 6 Powell on Real Prop., sec. 872, p. 155.5 (1971) and Kusler, Open Space Zoning: Valid Regulation or Taking, 57 Minn. L.R. 1, 29 (1972). See also the following law review notes and comments: 38 N.Y. Un. L.R. 1002,3 (1963); 64 Col. L.R. 81, 3, 5 (1964); 49 Corn. L.Q. 304, 6 (1964) and 79 Harv. L.R. 1320 (1966).

- 255 - It has been established for some time, however, that if a statute, ordinance or regulation serves a purpose to further which it is agreed that the police power may be used such as the maintenance of health, safety or property values, the enactment would not be invalidated merely because it served an aesthetic purpose as well, even when there was ground for suspecting that the aesthetic purpose was primary. See note, 79 Harv. L.R. 1320 (1966); Kusler, Protection for Inland Lakes, 1970 Wis. L.R. 35, 49-51 (1970); Leighty, Aesthetics as a Legal Basis for Environmental Control, 17 Wayne L.R. 1347, 1393 (1971) and *Peo. v. Stover*, 12 N.Y. of a substantial federal question, 375 U.S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107 (1963).
- 256 - 12 N.Y. 2d 462, 191 N.E. 2d 272, 240 N.Y.S. 2d 734, app. dism. for want of a substantial federal question, 375 U.S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107 (1963).
- 257 - 19 N.Y. 2d 263, 225 N.E. 2d 749, 279 N.Y.S. 2d 22, motion for rearg. den., 19 N.Y. 2d 862, 227 N.E. 2d 408, 280 N.Y.S. 2d 1025 (1967).
- 258 - 31 N.Y. 2d 262, 290 N.E. 2d 139, 338 N.Y.S. 2d 97 (1972).
- 259 - As supporting this version of the New York rule see *Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D. 2d 376, 288 N.Y.S. 2d 314 (1968); *Peo. v. Berlin*, 62 Misc. 2d 272, 307 N.Y.S. 2d 96 (Dist. Ct. Nassau Co., 1970) and Leighty, Aesthetics as a Legal Basis for Environmental Control, 17 Wayne L.R. 1347, 1381, n. 142 (1971). See also the following law review notes and comments: 38 N.Y. Un. L.R. 1002, 4 (1963); 49 Corn. L.Q. 304 (1964); 64 Col. L.R. 81, 9 (1964); 19 Syr. L.R. 87 (1967); 52 Minn. L.R. 946, 950 (1968) and 45 N.Y. Un. L.R. 1075, 1083 (1970). Among the cases decided in other states in accord with the New York position are *Oregon City v. Hartke*, 240 Ore. 35, 400 P. 2d 255, 262 (1965) and those cited in *State of North Carolina v. Vestal*, 281 N. Car. 517, 189 S.E. 2d 152, 7 (1972).
- 260 - 12 N.Y. 2d at pp. 467-8.
- 261 - 19 N.Y. 2d at p. 270.
- 262 - 31 N.Y. 2d 262, 290 N.E. 2d 139, 338 N.Y.S. 2d 97 (1972).
- 263 - Art. XIV, sec. 4 of the New York constitution, added by legislative passage in 1968 and 1969 and by approval by the people in 1969 (70 Col. L.R. 734, 754), reads in part as follows: "The policy of the

state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources..." While it is quite unlikely that the draftsmen of this provision, or the legislature which approved it, had private rights to beauty and view in contemplation, the New York courts might well hold that it authorizes resort to the police power to further purely aesthetic ends, and that the creation of such rights could therefore be upheld as a valid exercise of that power and so non-violative of the due process clause of the New York constitution (Art. I, sec. 6), even if it appeared in the particular case that the only interest which would be protected by their enforcement was in aesthetics.

It should be borne in mind, however, that if, as is often the case, the creation of such rights were attacked on the ground that their enforcement would violate the due process clause of the 14th amendment to the federal constitution, the position of the claimant of the new rights would not be as much strengthened by the above quoted provision of the New York constitution as it would be if the attack were based solely on a violation of the New York due process clause; for state constitutional provisions, as well as state statutes, will be held invalid if they violate a provision of the federal constitution. See *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 5 S. Ct. 329, 29 L. Ed. 587 (1885); *Texas Mexican Ry. Co. v. Locke*, 74 Tex. 370, 12 S.W. 80 (1889); *Bigelow v. Draper*, 6 N. Dak. 152, 69 N.W. 570, 3 (1896); *Matter of Tuthill*, 163 N.Y. 133, 8, 57 N.E. 303 (1900); *Opinion of the Justices*, 234 Mass. 597, 607, 127 N.E. 525 (1920) and *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).

264 - See pp. 15-16 and 23, ante.

265 - That a court, although denying that a landowner has a common law right that his neighbor shall not maintain an unsightly condition on his premises, might nevertheless hold that a statute purporting to create such a right would constitute a valid exercise of the police power is suggested by the statement in *Mathewson v. Primeau*, 64 Wash. 2d 929, 395 P. 2d 183, 9 (1964) that "...the great weight of authority up to the present time is that there is... 'a clear and most decided difference between direct control by the courts through the process of injunction on the one hand, and the control exercised by the legislative branch through the use of the police power on the other.'"

266 - See fn. 256, ante.

267 - *O'Connell*, Iowa's New Water Statute, 47 Ia. L.R. 549, 596-7 (1962); comment, *Zoning, Aesthetics and the First Amendment*, 64 Col. L.R.

81, 87-8 (1964) and Maloney and Ausness, Model Water Code, 22 Hast. L.J. 523, 532 (1971).

- 268 - 348 U.S. 26, 33, 70 S. Ct. 98, 99 L. Ed. 27 (1954). Although the issue actually involved in this case was as to what takings of land could be held to be for the public welfare under the law of eminent domain, the language quoted in the text and other expressions in the court's opinion seem broad enough to amount to at least a dictum that reasonable legislation, even though solely for the protection of aesthetic values, can constitute a valid exercise of the police power. See note, 49 Corn. L.Q. 304, 8 (1964) and Hines, Public Regulation of Water Quality 52 Ia. L.R. 186, 219 (1966).
- 269 - See pp. 6-7, ante.
- 270 - See p. 22, ante.
- 271 - New York constitution, Art. I, sec. 6; United States Constitution, 14th amendment.
- 272 - e.g., rights against unreasonable withdrawal or pollution of the water or against the creation of unreasonable noise or odors.
- 273 - P would have to rely on the additional legislation because sec. 15-0701 as it now reads does not seem to be enforceable against an impairment of natural beauty unless it had been effected by an alteration in the lake or stream. See p. 22, ante.
- 274 - As to this analogy see pp. 55-6 and fn. 257, ante.
- 275 - 2 Rathkopf, Law of Zoning and Planning (3d ed.) 58-1 (1960); 2 Yokley, Zoning Law and Practice (3d ed.), sec. 16-7, p. 218 (1965) Matter of Crossroads Recreation, Inc. v. Broz, 4 N.Y. 2d 39, 42, 149 N.E. 2d 65, 172 N.Y.S. 2d 129 (1958); Town of Greenburgh v. Bobandal Realities, Inc., 10 N.Y. 2d 414, 179 N.E. 2d 702, 223 N.Y.S. 2d 857 (1961) and note, Elimination of Nonconforming Use by "Amortization," 44 Corn. L.Q. 450, 3 (1959).
- 276 - 2 Rathkopf, Law of Zoning and Planning (3d ed.) 58-2 (1960).
- 277 - 2 Yokley, Zoning Law and Practice (3d ed.), sec. 16-7, p. 218 (1965); Peo. v. Miller, 304 N.Y. 105, 7, 106 N.E. 2d 34 (1952) and Town of Somers v. Camarco, 308 N.Y. 537, 541, 127 N.E. 2d 327 (1955).
- 278 - 2 Yokley, Zoning Law and Practice (3d ed.), sec. 16-3, p. 218 (1965) Peo. v. Miller, 105, 8, 106 N.E. 2d 34 (1952) and note, Elimination of Nonconforming Use by "Amortization," 44 Corn. L.Q. 450, 3 (1959).
- 279 - 2 Rathkopf, Law of Zoning and Planning (3d ed.) 58-1 (1960) and Matter of Harbison v. City of Buffalo, 4 N.Y. 2d 553, 8, 152 N.E. 2d 42, 176 N.Y.S. 2d 598 (1958). In other words, in these cases the courts

are dealing with the question as to whether abolition of a particular nonconforming use would be a permissible exercise of the police power; and therefore apply the criteria to which resort is usually made when disposing of such a question. As to these criteria, see p. 50, ante.

- 280 - *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E. 2d 327 (1955).
- 281 - *Peo. v. Miller*, 304 N.Y. 105, 106 N.E. 2d 34 (1952) and *Matter of Harbison v. City of Buffalo*, 4 N.Y. 2d 553, 152 N.E. 2d 42, 176 N.Y.S. 2d 598 (1958). In the second of these cases the court reversed a decision in favor of a nonconforming user because of the possibility that the zoning ordinance could reasonably be enforced against him, and remanded the case for retrial in order that evidence having a bearing on the reasonableness of refusing protection might be taken. The court said (pp. 563-4 of the official report): "Material triable issues of fact remain, and a further hearing should adduce evidence relating to the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which petitioners might relocate, the cost of such relocation, as well as any other reasonable costs which bear upon the kind and amount of damages which petitioners might sustain, and whether petitioners might be able to continue operation of their business if not allowed to continue storage of barrels or steel drums outside their frame building. It is only upon such evidence that it may be ascertained whether the resulting injury to petitioners would be so substantial that the ordinance would be unconstitutional as applied to the particular facts of the case."
- 282 - Also affording analogical support for this conclusion is *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390, 2 LRA 81 (1889) in which it was held that a statute forbidding the maintenance of a spite fence could be enforced as a valid police power measure against a defendant who had built one prior to the enactment of the statute when it was still lawful for him to do so. In arriving at this conclusion the court emphasized the relatively insignificant loss which would be caused defendant by the removal of the fence. This holding was cited with apparent approval in *Camfield v. U.S.*, 167 U.S. 518, 523, 4, 17 S. Ct. 866, 42 L. Ed. 261 (1889). For discussion of *Rideout* see comment, *Constitutionality of the Pennsylvania Spite Fence Statute*, 75 Dick L.R. 281, 292-3 (1971).
- 283 - For discussion of the effect of proof that enforcement of a zoning ordinance will cause loss to the objecting landowner in cases in which he had not begun the forbidden use prior to the effective date of the ordinance see pp. 50-56, ante.
- 284 - See pp. 11-12, ante.
- 285 - *Michelson v. Leskowitz*, 55 N.Y.S. 2d 831 (Sup. Ct., 1945), *affd.* 270 A.D. 1042, 63 N.Y.S. 2d 191 (1946). The trial court, when deciding in this case that defendant's pollution of a stream was reasonable and not a nuisance, and that the injunctive relief sought by the

plaintiff was inappropriate, stressed the extent of defendant's investment which a decision against him would have jeopardized. See also p. 12, ante.

- 286 - Since in the law of zoning the fact that defendant's violating structure was erected before the enactment of the prohibitory zoning ordinance is a circumstance relevant to the issue as to whether enforcement of the ordinance against the defendant would be reasonable (see pp. 58-9, ante), it would seem to follow that the fact that the defendant's structure impairing the beauty or obstructing the view of the plaintiff's prospect had been erected prior to rather than after the effective date of the legislation creating the rights to beauty and view would be a circumstance relevant to the issue as to whether the continued existence of the defendant's structure would constitute an unreasonable interference with the plaintiff's aesthetic rights. And such a position would not be inconsistent with the riparian doctrine, for while under that doctrine priority in time does not in and of itself determine priority of right (Torts Restat., com. h to sec. 853 (1939); 3 Tiffany on Real Prop. (3d ed.) 417 (1939); VI-A Amer. L. Prop. 159 (1954)), priority in time can be taken into account when passing upon the reasonableness of competing uses. See Torts Restat., com. g to sec. 853 (1939); Martz, Water for Mushrooming Populations, 62 W. Va. L.R. 1, 11 (1959); Strobel v. Kerr Salt Co., 164 N.Y. 303, 315, 58 N.E. 142 (1900) Obrecht v. Nat'l. Gypsum Co., 361 Mich. 399, 419, 105 N.W. 2d 143 (1960) and Wasserburger v. Coffee, 180 Neb. 149, 141 N.W. 2d 738, 745-7 (1966).
- 287 - See fn. 108, ante and U.S. v. Fallbrook Public Utility Dist., 347 F. 2d 48, 58 (1965).
- 288 - See fn. 285, ante.
- 289 - See the preceding par. and fn. 286, ante.
- 290 - Scurlock, Retroactive Legislation Affecting Interests in Land, 6 (1953).
- 291 - The last sentence of subd. (1) reads as follows: "This subdivision shall apply to such an action regardless of whether the alteration sought to be made the basis of it was caused before or after the effective date of this section."
- 292 - The first clause of subd. (2) reads as follows: "2. For the purpose of this section, 'harm' shall mean:."
- 293 - See pp. 6-7, ante.
- 294 - See fn. 40, ante.
- 295 - That except in those instances in which the state has retained the sovereign or reserve power when conveying the bed of a body of water,

the state does not have such a power over bodies of water the beds of which are in private ownership see *Commissioners of Canal Fund v. Kempshall*, 26 Wend. 404 (N.Y. Ct. of Err., 1841); *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185, 38 Am. Re. 407 (1880); *Fulton, Light, Heat and Power Co. v. State of New York*, 200 N.Y. 400, 420, 94 N.E. 199 (1911); *Squaw Island Freight Terminal Co., Inc. v. City of Buffalo*, 273 N.Y. 119, 127-8, 7 N.E. 2d 10 (1937) and *Niagara Falls Power Co. v. Duryea*, 185 Misc. 696, 703-4, 57 N.Y.S. 2d 777 (Sup. Ct., 1945). Clearly consistent with the position taken in these cases, although not expressly referring to it are the statements in *Matter of Van Etten v. City of New York*, 226 N.Y. 483, 6, 124 N.E. 201 (1919) in regard to Esopus Creek, the bed of which was probably privately owned as the creek was not navigable; the statements in *Niagara Falls Power Co. v. Water Power and Control Comn.*, 267 N.Y. 265, 277, 196 N.E. 51 (1935) and those in *Rose v. State of New York*, 24 N.Y. 2d 80, 5, 246 N.E. 2d 735, 298 N.Y.S. 2d 969 (1969), a case involving the Chenango, a navigable river with a privately owned bed.

The statement in *N.Y. State Water Resources Comn. v. Liberman*, 37 A.D. 2d 484, 8, 326 N.Y.S. 2d 284 (1971), app. diss., 30 N.Y. 2d 516, 280 N.E. 2d 889, 330 N.Y.S. 2d 63 (1972) that "the State has the power to regulate waters even when the title to the land under water is in private ownership" is not contrary to the foregoing cases, because the statement's context shows that it was made with respect to the state's police power rather than in regard to its sovereign power. Conflicting inferences can, however, be drawn from the cases cited in *Hackensack Water Co. v. Village of Nyack*, 289 F. Supp. 671, 683-4 (U.S. Dist. Ct., S.D.N.Y., 1968) and from the tenor of the court's comments on them, as to whether the court believed that the state's sovereign or reserve power is restricted to bodies of water the beds of which the state owns.

Although sec. 15-1705 of the Environmental Conservation Law could be read as consistent with the first sentence of this footnote, the meaning of that section is not entirely clear, and as yet the courts do not seem to have found occasion to remove the uncertainty by interpreting it.

296 - *Lee, Acquisition of Riparian Rights in New York*, 1964 Proceedings, Amer. Bar Assn., Section of Mineral and Natural Resources Law, 19; *Niagara Falls Power Co. v. Duryea*, 185 Misc. 696, 702-6, 57 N.Y.S. 2d 777 (Sup. Ct., 1945); *State of New York v. System Properties, Inc.*, 2 N.Y. 2d 330, 344-5, 141 N.E. 2d 429, 160 N.Y.S. 2d 859 (1953) and *Hackensack Water Co. v. Village of Nyack*, 289 F. Supp. 671, 683-4 (U.S. Dist. Ct., S.D.N.Y., 1968).

297 - See pp. 16 and 55 ante.

298 - That the state's sovereign power may be exercised in furtherance of recreational interests see *State of New York v. System Properties, Inc.*, 2 N.Y. 2d 330, 344-5, 141 N.E. 2d 429, 160 N.Y.S. 2d 859 (1953) and

Andrews v. State of New York, 19 Misc. 2d 217, 221, 188 N.Y.S. 2d 854 (Ct. of Cl., 1959), affd. in memo. opinions making no reference to the state's powers - 11 A.D. 2d 599, 220 N.Y.S. 2d 451 (1960), 9 N.Y. 2d 606, 176 N.E. 2d 42, 217 N.Y.S. 2d 9 (1961). See also New York Constitution, Art. 14, sec. 4, set forth in part in fn. 263, ante, in which section it is declared that it is the policy of the state to protect scenic beauty; a statement which could be taken as indicating that any statute affording reasonable protection to scenic beauty would be serving a public purpose.

- 299 - As in Gould v. Hudson River Rr. Co., 6 N.Y. 522 (1852); Peo. v. Tibbetts, 19 N.Y. 523 (1859); Peo. ex rel. Niagara Falls Hydraulic Power and Mfg. Co. v. Smith, 70 A.D. 543, 75 N.Y.S. 100 (1902), affd. w.o., 175 N.Y. 469, 67 N.E. 1088 (1903); Squaw Island Freight Terminal Co., Inc. v. City of Buffalo, 272 N.Y. 119, 7 N.E. 2d 10 (1937); Niagara Falls Power Co. v. Duryea, 185 Misc. 696, 57 N.Y.S. 2d 777 (Sup. Ct., 1945); State of New York v. System Properties, Inc., 2 N.Y. 2d 330, 141 N.E. 2d 429, 160 N.Y.S. 2d 859 (1953) and Niagara Mohawk Power Corp. v. Federal Power Comn., 202 F. 2d 190, affd. sub. nom. Federal Power Comn. v. Niagara Mohawk Power Corp., 347 U.S. 239, 74 S. Ct. 487, 98 L. Ed. 666 (1954) without discussion of New York's sovereign power.
- 300 - As in Niagara Falls Power Co. v. Water Power and Control Comn., 267 N.Y. 265, 196 N.E. 51 (1935) and Matter of City of Syracuse v. Gibbs, 283 N.Y. 275, 28 N.E. 2d 835 (1940).
- 301 - As in Granger v. City of Canandaigua, 257 N.Y. 126, 177 N.E. 394 (1931).
- 302 - See, for example, Peo. v. Tibbetts, 19 N.Y. 523 (1850); Peo. ex rel. Loomis v. Canal Appraisers, 33 N.Y. 461 (1865) and State of New York v. Systems Properties, Inc., 189 Misc. 991, 76 N.Y.S. 2d 758 (1947), 281 A.D. 433, 120 N.Y.S. 2d 269, 2 N.Y. 2d 330, 141 N.E. 2d 429, 160 N.Y.S. 2d 859 (1953).
- 303 - 168 U.S. 349, 358, 371, 18 S. Ct. 157, 42 L. Ed. 497 (1897).
- 304 - While in St. Anthony Falls the court used the phrase "public right" rather than the words "sovereign power," it seems reasonably clear that the public right recognized in Minnesota is the substantial equivalent of the sovereign power recognized in New York.
- 305 - As to the source and extent of the federal navigation power and its relation to the navigation power enjoyed by the states see Trelease, Federal Limitations on State Water Law, 10 Un. of Buf. L.R. 399, 400-402 (1961). That the reason customarily given for the rule that harm caused by the exercise of the federal navigation power is non-compensable is that the property interest of the harmed party was already burdened with the navigation power servitude when he acquired it see Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 Nat. Res. J. 1, 19-22 (1963)

and *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 82, 33 S. Ct. 667, 57 L. Ed. 1063 (1913). The noncompensability of harm resulting from the exercise of the navigation power of the state of New York has been explained in substantially similar terms. See *Matter of City of New York (Speedway)*, 168 N.Y. 134, 147, 61 N.E. 158, 56 LRA 500 (1901). See also fn. 314, post.

306 - See fn. 227, ante.

307 - Beck, *Governmental Refilling of Lakes*, 46 Tex. L.R. 180, 212 (1967).

308 - See pp. 59-62, ante.

309 - See p. 50, ante.

310 - See fns. 40 and 295, ante.

311 - Although the New York courts do not seem to have made this statement expressly, they have approved it in effect by holding without exception that a taking of water for municipal supply from a lake or stream the bed of which is in private ownership constitutes a compensable violation of private riparian rights. See the cases cited in fn. 66, ante, and Lee, *Acquisition of Riparian Rights in New York*, 1964 Proceedings Amer. Bar Assn., Section of Mineral and Resources Law, 19 in which it seems to be assumed that if the extent of New York City's obligation to compensate riparian owners harmed by withdrawals for municipal supply is to be reduced, that reduction will have to be accomplished by the exercise of the state's sovereign power rather than by resort to its police power. As squarely holding that an uncompensated taking for municipal supply is not a valid exercise of the police power see *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P. 2d 585, 590, 592 (1958). For other grounds on which such takings have been held unlawful see fn. 40, ante.

312 - 282 U.S. 660, 670, 51 S. Ct. 286, 75 L. Ed. 602 (1931).

313 - As to sec. 15-0701 as a police power measure see pp. 49-61, ante.

314 - That the states have power to regulate the use of navigable waters and to protect and improve their navigability provided their use of the power does not interfere with the exercise by the federal government of its superior power over navigation, and that the harm caused to persons engaged in water-based activity when either the federal government or a state exercises its navigation power is non-compensable see VI-A Amer. L. Prop. 178, fn. 3 (1954); Trelease, *Federal Limitations on State Water Law*, 10 Buf. L.R. 399, 400-402 (1961); 5 Powell on Real Prop., sec. 723.1, pp. 412.8-412.10 (1971) and *U.S. v. Rio Grande Irrigation Co.*, 174 U.S. 690, 703, 19 S. Ct. 770, 43 L. Ed. 1136 (1898). See also as to the federal and state navigation powers fn. 220, ante. That the state navigation power is one enjoyed by the State of New York see *Smith v. City of Rochester*, 92 N.Y. 463, 482,

44 Am. Rep. 393 (1883); *Sage v. Mayor etc. of City of New York*, 154 N.Y. 61, 71, 47 N.E. 983, 38 LRA 591 (1897) and *Erbsland v. Vecchiolla*, 35 A.D. 2d 564, case 4, 313 N.Y.S. 2d 576 (1970).

As in New York as in several other jurisdictions the navigation power can be successfully relied on to justify an uncompensated impairment of a private property interest only when the legislation can reasonably be viewed as in furtherance of navigation (*Fulton Light, Heat and Power Co. v. State of New York*, 200 N.Y. 400, 418, 94 N.E. 199 (1911) and *Marine Airways, Inc. v. State of New York*, 201 Misc. 349, 350, 104 N.Y.S. 2d 964 (Ct. of Cl., 1951), *affd. w.o.*, 280 A.D. 1021, case 1. 116 N.Y.S. 2d 778 (1952) and *Harnsberger, Eminent Domain and Water Law*, 48 Neb. L.R. 325, 445 (1969)), it would usually be difficult to validate an uncompensated impairment of a common law privilege of land use resulting from legislation creating a private right to beauty and view by invoking the state's navigation power. However, *Home for Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124,9 (1909) has been interpreted, and perhaps properly, as holding that if legislation providing for a dam in furtherance of navigation provides also for the creation of a public park as reasonably necessary to the main project in view of the change in the level of the water required thereby, the taking of the land for the park is non-compensable. See note, 23 Oh. St. L.J. 771, 2 (1962).

315 - In regard to sec. 15-0701 as an exercise of the state's sovereign power see pp. 61-63, ante.

316 - See, for example, *Water Resources and the Law* (chap. by King) 292 (1958) and *O'Connell, Iowa's New Water Statute*, 47 Ia. L.R. 549, 597-8 (1962).

317 - See, for example, *Haber and Bergen, Water Allocation in the Eastern U.S.* (chap. by Fisher) 456 (1958); *Larson, Development of Water Rights*, 38 N. Dak. L.R. 243, 254 (1962) and *Trelease, Alaska's New Water Use Act*, 2 Land and Water L.R. 1, 32 (1967).

318 - 174 U.S. 690, 702-3, 19 S. Ct. 770, 43 L. Ed. 1136 (1898).

319 - 174 U.S. at 703.

320 - Consistent with this interpretation of *U.S. v. Rio Grande Irrigation Co.* is the comment on that case in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158-160, 55 S. Ct. 725, 95 L. Ed. 1356 (1934).

321 - 206 U.S. 46, 94, 46 S. Ct. 118, 51 L. Ed. 956 (1907).

322 - There appear to be no cases squarely passing on this question. The point has been raised but has not yet been decided in *Elwood v. City of New York*, 271 F. Supp. 62 (1967).

- 323 - See p. 64, ante.
- 324 - 282 U.S. 660,670, 51 S. Ct. 286, 75 L.Ed. 602 (1931).
- 325 - It is interesting to note that in *Amory v. Commonwealth*, 321 Mass. 240, 72 N.E. 2d 549 (1947) a Massachusetts riparian owner harmed by the diversion involved in *Conn. v. Mass.* recovered damages therefore from Massachusetts. The statute which authorized the diversion (Acts & Resolves of Mass., 1927, chap. 321) provided for such compensation in its fourth section. Although the court did not in terms base plaintiff's recovery on this provision, its existence precludes the citation of *Amory* as authority for the proposition that a state is obligated at common law to give compensation for harm caused to its riparian owners by a change in its water law. Whether the Massachusetts legislature included the provision because it doubted that the United States Supreme Court declarations under consideration were meant to exempt the state from liability for such harm or because the Massachusetts court thought it unjust or unwise or contrary to the public interest to exercise a power which it had is a speculative matter.
- 326 - 295 U.S. 142,158, 55 S.Ct. 725, 95 L.Ed. 1356 (1934).
- 327 - 295 U.S. 142,163-4, 55 S.Ct. 725, 95 L.Ed. 1356 (1934).
- 328 - 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911).
- 329 - *Hathorn v. Natural Carbonic Gas Co.*, 194 N.Y. 326, 87 N.E. 504, 23 LNS 436 (1909).
- 330 - 145 F.Supp. 617,624, *affd.w.o.*, 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed. 2d 73 (1956).
- 331 - 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).
- 332 - 26 Wash.2d 635, 172 P.2d 955 (1946).
- 333 - 67 Wash.2d 799, 410 P.2d 20 (1966).
- 334 - 389 U.S. 290,3 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).
- 335 - 389 U.S. 290,5 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).
- 336 - Justice Stewart's emphasis on the unforeseeability of the change should have the approval of the writers who said: "Change must not be so drastic that, in the light of past decisions and changing circumstances, it could not reasonably have been expected to occur in the court of the gradual development of the law." (*Haber & Bergen, Water Allocation in the Eastern U.S.* (chap. by Fisher) 448 (1958)); and "The system may change; as long as the change is rationally designed in the public interest and not (so) startling or inequitable as to disturb the reasonable expectations of those with the right to make use of water, the change is probably not

an invasion of whatever property rights exist." (O'Connell, Iowa's New Water Statute, 47 Ia.L.R. 549,615 (1962)). See also Kates, Georgia Water Law, 67-8 (1969) & p. 50, ante.

- 337 - As recommended at pp. 22-26, ante.
- 338 - "Congress shall make no law...abridging the freedom of speech...". See also Art. 1, sec. 8 of the New York constitution, the first sentence of which reads as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."
- 339 - *Cantwell v. Connecticut*, 310 U.S. 296,303, 60 S.Ct. 900, 84 L.Ed. 1213, 128 ALR 1352 (1940); *New York Times v. Sullivan*, 376 U.S. 254,276-7, 84 Sup.Ct. 710, 11 L.Ed.2d 686, 95 ALR2d 1412 (1964) & *Healey v. James*, 408 U.S. 169,171, 92 S.Ct. 104, 33 L.Ed.2d 266 (1972).
- 340 - That the 1st & 14th amendments do not protect one person against the acts of another, but restrain only action by the federal and state governments see Lewis, *Meaning of State Action*, 60 Col.L.R. 1083,5 (1960), *Selected Essays on Constitutional Law*, 915,7 (1963); *Civil Rights Cases*, 109 U.S. 1,13, 3 S.Ct. 150, 27 L.Ed. 835 (1883); *Diamond v. Bland*, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733,741 (1970), cert.den. sub nom. *Homart v. Diamond*, 402 U.S. 988, 91 S.Ct. 1661, 29 L.Ed.2d 153 (1971), reh. den., 404 U.S. 874, 92 S.Ct. 1189, 31 L.Ed.2d 257 (1972) & *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551,567, 92 Sup.Ct. 2219, 33 L.Ed.2d 131 (1972).
- 341 - Lewis, *Meaning of State Action*, 60 Col.L.R. 1083, 1108-9 (1960), *Selected Essays on Constitutional Law*, 915,936 (1963); Kauper, *Civil Liberties & the Constitution*, 111,135,141,151 (1962); *Shelley v. Kraemer*, 334 U.S. 1,14-23, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *New York Times Co. v. Sullivan*, 376 U.S. 254,265, 84 S.Ct. 710, 11 L.Ed.2d 686, (1964) & *Hosey v. Club Van Cortland*, 299 F.Supp. 501 (1969). Possibly contra is *Aluli v. Trusdell*, 508 P.2d 1215 (Haw.Sup.Ct., 1973) the majority opinion in which relies on dicta in *Edwards v. Habib*, 379 F.2d 687 (1968). If the case is carried higher it is conceivable that the United States Supreme Court would reverse for the reasons stated in the dissenting opinions at pp. 478,479.
- 342 - "It is speech in the sphere of political activities and concerned with matters of public interest that should be the highest and the preferred speech value under the First Amendment. This is the aspect of speech that most clearly distinguishes a democratic society." - Kauper, *Civil Liberties & the Constitution*, 119-120 (1962). "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will

of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." - Hughes, Ch. J. in *De Jonge v. Oregon*, 299 U.S. 353,365, 57 S. Ct. 255, 81 L. Ed. 278 (1937). See also *Schneider v. New York*, 308 U.S. 147,161, 60 S.Ct. 146, 84 L. Ed. 155 (1939) & *New York Times v. Sullivan*, 376 U.S. 254,269-270, 297,301, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 ALR2d 1412 (1964).

- 343 - "The state must also be able to regulate conduct aimed not merely at the expression of an idea but at the coercion of a particular result. It is one thing, for example, to engage in a sit-in for the purpose of making a view known, and quite another to take possession of property until demands are met. Although the conduct in the latter case may serve to communicate the intensity of one's belief, it has in addition a tactical purpose for which first amendment protection is not available." - Note, *Symbolic Conduct*, 68 Col.L.R. 1091,1123 (1968). In a note in 7 Ga.L.R. 178 (1972) *Hughes v. Superior Court*, 339 U.S. 460,464-5, 70 Sup.Ct. 718, 94 L.Ed. 985 (1949) is justifiably cited at p. 186 as supporting the following statement: "Because picketing contains a coercive element, it is not a pure first amendment activity and is, therefore, subject to greater regulation." Consistent with the quoted statements are *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535 (1968) & *Cornell University v. Livingston*, 69 Misc. 2d 965, 332 N.Y.S. 2d 843 (Sup.Ct., 1972) involving coercive sit-ins.
- 344 - 12 N.Y.2d 462,470, 191 N.E. 2d 272, 240 N.Y.S.2d 734, app.dism. for want of a substantial federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107 (1963). The quoted sentence was emphasized in a note on *Stover* in 49 Corn.L.Q. 304 (1964) and in *Leighty, Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L.R. 1347,1391 (1971). Also relevant here is the following quotation from *Broughton, Aesthetics & Environmental Law*, 7 Land & Water L.R. 451,473, fn. 90 (1972): "If the Stovers had posted a number of signs on their land, detailing various aspects of the injustice of high taxes and calling for the defeat at the next election of the officials who had imposed the high taxes, it would have been much more difficult to have framed and upheld an ordinance prohibiting the conduct."
- 345 - Comment, *Zoning, Aesthetics & the First Amendment*, 60 Col.L.R. 81, 102, 108 (1960); *Kauper, Civil Liberties & the Constitution*, 111-120, 146 151-2 (1962); *Frantz, The First Amendment in Balance*, 71 Yale L.J. 1424, 1432-3 (1962); *Leighty, Aesthetics as a Basis for Environmental Control*, 17 Wayne L.R. 1347,1391 (1971); note, *The First Amendment* 72 Col. L.R. 1249,1264 (1972); Note, *Aesthetics & Objectivity*, 71 Mich. L.R. 1438, 1459 (1973); *Breard v. Alexandria*, 341 U.S. 622,625-5, 642,644, 71 S. Ct. 920,95 L.Ed. 1233, 35 ALR 2d 335 (1951); *Cox v. Louisiana*, 379 U.S. 535,554,85 S.Ct. 453, 13 L.Ed.2d 471 (1964); *Adderley v. Florida*,385 U.S. 39,47-8, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *Peltz v. City of South Euclid*, 11 Oh.St.2d 128, 228 N.E.2d 320, 323-4 (1967); *U.S. v. Miller*, 367 F.2d 72,80 (1966), cert.den., 386 U.S. 911, 87 Sup.Ct. 855, 17 L.Ed.2d 787 (1967), reh.den., 392 U.S. 917, 88 S.Ct. 2049, 20 L.Ed.2d 1378 (1968); *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535,544 (1968); *Edwards v. Habib*,

130 U.S.App.D.C. 126, 397 F.2d 687,695 (1968), cert.den., 393 U.S. 1016, 89 Sup.Ct. 618, 21 L.Ed.2d 560 (1969); *Women Strike for Peace*, 420 F.2d 597,606 (1969); affd.w.o. by an equally divided court, 401 U.S. 531, 91 Sup.Ct. 1217, 27 L.Ed.2d 102, reh.den., 402 U.S. 989, 91 S.Ct. 1646, 29 L.Ed.2d 157 (1971) & *Diamond v. Bland*, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733,9 (1970), cert.den. sub nom. *Homart v. Diamond*, 402 U.S. 988, 91 S.Ct. 1661, 20 L.Ed.2d 153 (1971), reh.den., 404 U.S. 874, 92 S.Ct. 1189, 31 L.Ed.2d 257 (1972).

Although resort in first amendment cases to the balancing process referred to in the text has not infrequently been criticized on various grounds, the courts continue to use it. A recent attack upon such use and references to previous adverse comments upon it can be found in DuVal, *Free Communication of Ideas and the Quest for Truth*, 41 Geo.Wash.L.R. 161, 172-7 (1972).

- 346 - Note, *The First Amendment*, 72 Col.L.R. 1249,1264 (1972); *Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 348, 79 N.E.2d 333, 3 ALR2d 423, cert. & Reh.den., 335 U.S. 886,912, 69 S.Ct. 232,479, 93 L.Ed. 425,445 (1948); *Women Strike for Peace v. Hickel*, 420 F.2d 597,606 (1969) - dissenting opinion; *Sword v. Fox*, 446 F.2d 1091,7 cert.den., 404 U.S. 994, 92 S.Ct. 534, 30 L.Ed.2d 547 (1971) & *Grayned v. City of Rockford*, 408 U.S. 104,116, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).
- 347 - See pp. 7-8 & 23-24, ante.
- 348 - *Schneider v. State*, 308 U.S. 147,163, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Martin v. City of Struthers*, 319 U.S. 141,150, 63 S.Ct. 682, 87 L.Ed. 1313 (1943) & *Diamond v. Bland*, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733,8 (1970), cert.den. sub nom. *Homart v. Diamond*, 402 U.S. 988, 91 S.Ct. 1661, 29 L.Ed.2d 153 (1971), reh.den., 404 U.S. 874, 92 S.Ct. 1189, 31 L.Ed.2d 257 (1972).
- 349 - *Kovacs v. Cooper*, 336 U.S. 77,88-9, 69 S.Ct. 448, 93 L.Ed. 513, 10 ALR2d 608 (1949) & *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551,567, 92 Sup.Ct. 2219, 33 L.Ed.2d 131 (1972).
- 350 - As to the existence of this right see *Torts Restat.*, sec. 822 (1939) & *Prosser on Torts* (4th ed.) 580 (1971). Such a property right is, of course, protected by the 5th & 14th amendments to the federal constitution. See quote from *Lloyd Corp.* in fn. 351, post.
- 351 - See *Peo. v. Bohnke*, 287 N.Y. 154,8, 38 N.E.2d 748 (1941); *Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339,348, 79 N.E.2d 333, 3 ALR2d 423 (1948), cert. & Reh.den., 335 U.S. 886,912, 69 S.Ct. 232, 479, 93 L.Ed. 425,445 (1948-9); *Kovacs v. Cooper*, 336 U.S. 77,86, 69 S.Ct. 448, 93 L.Ed. 513, 10 ALR2d 608 (1949) & *Cox v. Louisiana*, 379 U.S. 559,578, 85 S.Ct. 466, 13 L.Ed.2d 487 (1965) in which Black, J. said: "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly where people have a right to be for such purposes...Where the law otherwise, people on the streets, in their homes and anywhere else could be compelled

to listen against their will to speakers they did not want to hear." Although this statement was contained in a dissenting opinion, there seems to be nothing in the prevailing opinion which conflicts with Justice Black's position in this regard in any way. See also *Adderley v. Florida*, 385 U.S. 39, 47, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568, 570, 92 Sup.Ct. 2219, 33 L.Ed.2d 131 (1972) the court said: "...this court has never held that a trespasser or an uninvited guest may exercise generally rights of free speech on property privately owned and used nondiscriminatorily for private purposes only...the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other." See also Van Alstyne, *Constitutional Review*, 1965 Duke L.J. 219, 247; Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L.R. 29, 61 (1973); & *Gordon v. Walkley*, 41 A.D.2d 493, 344 N.Y.S.2d 233, 7 (1973).

- 352 - Witness to the fact that the law attaches greater importance to the landowner's right to freedom from trespass than it accords to his right to freedom from nuisance is borne by the contrast between the trespass and nuisance rules with respect to the necessity of proof by the plaintiff of actual damages and in regard to the ability of the defendant to escape liability if he can show that his conduct was reasonable. While a plaintiff upon whose land the defendant has intruded can secure injunctive relief without proof of harm present or threatened (Torts Restat.2d, sec. 163 (1965) & Prosser on Torts (4th ed.) 66 (1971)), a plaintiff cannot obtain such relief in an action for nuisance unless he can make such proof. (See Torts Restat., sec. 822 & com. g (1939) & Prosser on Torts (4th ed.) 577 (1971).) Again while a defendant when sued for trespass cannot, according to the great weight of authority, escape liability by establishing the reasonableness of his conduct (Keeton, *Trespass, Nuisance & Strict Liability*, 59 Col.L.R. 457, 465 (1959); note, 45 Corn.L.Q. 836, 8 (1960) & note, 19 Okla.L.R. 117, 122 (1966)), a defendant in an action for nuisance can do so. (See Torts Restat., sec. 822 & com. i (1939) & Prosser on Torts (4th ed.) 580 (1971). This partiality toward the right to freedom from trespass may be accounted for at least in part by the fact that "Physical possession doubtless is the most cherished prerogative, and the most dramatic index of ownership of tangible things." (Michelman, *Property, Utility & Fairness: Just Compensation*, 80 Harv.L.R. 1165, 1228 (1967)) and by the widely entertained and deeply rooted conviction that the public good is well served by guaranteeing to individual landowners the secure possession of their premises in order to avoid the dangerous breaches of the peace which might well follow an entry on the land of another against his will. See Keeton, *supra*, at 469. As to the tenacious vitality of the belief that a man's house should be his castle. See Mechem, *The Peasant in his Cottage*, 28 Sou.Cal.L.R. 139 (1955).

- 353 - "We see no reason why a public nuisance which is a menace to the well-being of the children in a community should be protected by the First Amendment." - *Cactus Corp. v. State of Arizona*, 14 Ariz.App. 38, 480 P.2d 375,9 (1971); approved in *Peo. v. Lou Bern Broadway, Inc.*, 68 Misc.2d 112,6, 325 N.Y.S.2d 806 (N.Y. City Crim.Crt., 1971). Nor would there seem to be any cogent reason why this statement of the Arizona court should not in appropriate cases be deemed applicable to private nuisances as well.
- 354 - Of course if a protest against a tax assessment cannot be classified as a political expression, *Stover* cannot be cited as upholding legislative regulation of such expression. It could be argued, however, that, as a practical matter, tax assessments lie at least partially in the political field, however regrettable that may be.
- 355 - For discussion of this conclusion see pp. 55-57, ante.
- 356 - 12 N.Y.2d 462,9, 191 N.E.2d 272, 240 N.Y.S.2d 734, app.dism. for want of a substantial federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107 (1963). Although the court may have based its decision partly on its suspicion that the clothelines were intended to coerce rather than to persuade (see p. 72, ante), a conclusion that the court actually did so would not reduce its statement as to the reasonableness and constitutionality of the ordinance to the status of mere dictum; for when a court offers more than one ground for a decision, each ranks as a holding. (See *U.S. v. Title Ins. Co.*, 265 U.S. 472,486, 44 S.Ct. 621, 68 L.Ed. 1110 (1923) & *Woods v. Interstate Realty Co.*, 337 U.S. 535, 69 Sup.Ct. 1235, 93 L.Ed. 1524 (1949).)
- 357 - 44 Misc.2d 353, 253 N.Y.S.2d 731 (1964).
- 358 - 351 F.Supp. 949 (1972).
- 359 - 351 F.Supp. at 952-4 (1972).
- 360 - 351 F.Supp. at 954-5 (1972). For dicta that reasonable regulation of political signs for aesthetic ends is constitutionally permissible, uttered in connection with holdings that complete prohibition of such signs violates the first amendment, see *Peltz v. City of South Euclid*, 11 Oh.St.2d 128, 228 N.E.2d 320 (1967); *Pace v. Village of Walton Hills*, 15 Oh.St.2d 51, 238 N.E.2d 542 (1968); & *Farrell v. Township of Teaneck*, 126 N.J. Super. 459, 315 A.2d 424 (1974). In *Town of Huntington v. Schwartz Estate*, 63 Misc.2d 836, 313 N.Y.S.2d 918 (Suffolk Co.Dist.Ct., 1970) the court dismissed charges that the defendant had violated ordinances regulating the erection of political signs, because it appeared that the defendants had erected them prior to the effective dates of the ordinances. The court went on, however, to declare the ordinances constitutional, citing *Gibbons* for the proposition that the right to free speech may be restricted by reasonable regulations for the public welfare.

- 361 - As to the improbability of serious disagreement as to whether beauty has in fact been impaired by a defendant who has in some way altered the scene provided by nature see p. 19, ante.
- 362 - In regard to the attention paid in nuisance cases to the relative suitability factor see the authorities cited in fn. 55, ante. For first amendment cases in which this comparison was taken into account see fn. 346, ante.
- 363 - Nuisance cases in the decision of which the relative harm factor played a part can be found in fn. 56, ante. Among the first amendment cases stressing the importance of relative harms are *Cox v. Louisiana*, 379 U.S. 536, 563, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Peo. v. Katz*, 21 N.Y.2d 132, 5, 233 N.E.2d 320, 286 N.Y.S.2d 839 (1967) & *Peltz v. City of South Euclid*, 11 Oh.St.2d 128, 228 N.E.2d 320, 323-4 (1967).
- 364 - Nuisance cases the outcome of which turned on the ability of one of the parties to take steps which would reduce the harm complained of are cited in fn. 57, ante. Also belonging in this category is *Pennsylvania Coal Co. v. Sanderson*, commented on in fn. 56, ante. For first amendment cases giving attention to this factor see *U.S. v. Miller*, 367 F.2 72, 9 (1966), cert.den., 386 U.S. 911, 87 S.Ct. 855, 17 L.Ed.2d 787 (1967), reh.den., 392 U.S. 917, 88 S.Ct. 2049, 20 L.Ed.2d 1378 (1968); *Diamond v. Bland*, 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733, 6 (1970), cert.den. sub nom. *Homart v. Diamond*, 402 U.S. 988, 91 S.Ct. 1661, 20 L.Ed.2d 153 (1971), reh.den., 404 U.S. 874, 92 S.Ct. 1189, 31 L.Ed.2d 257 (1972) & *Ross v. Goshi*, 351 F.Supp. 949, 954 (1972).
- 365 - That according to most of the available authority - with which New York apparently concurs - the courts should, when deciding whether a defendant has been guilty of nuisance, give weight to the extent to which the several litigants can identify their respective interests with the more important of the public interests involved see fn. 58, ante. Ample authority for the balancing of all the interests, both public and private, in the first amendment cases is cited in fn. 345, ante.
- 366 - The inference that the first amendment requires that a person engaging in political utterance be shielded not only from restraint by injunction and imprisonment but from the fear of liability in damages as well can easily be drawn from *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-8, 84 S.Ct. 710 11 L.Ed.2d 686, 95 ALR2d 1412 (1964).

And if it had not been assumed in the hypothetical case under consideration that A had conceded that the statute was a valid police power measure, and the court, therefore, would have to pass on that point, there would be the possibility of triplication in the weighing process.

367 - See pp. 74-75 & fn. 360, ante.

368 - See p. 73, ante.

- 369 - See pp. 10,14-16 & 56-57, ante.
- 370 - See pp. 71-72, ante.
- 371 - "The ordinance in question sweeps away the right of a property owner to express his opinion on his own property. Defendant's interest in aesthetics does not reasonably outweigh the loss of plaintiff's liberty of speech." - *Peltz v. City of South Euclid*, 11 Oh.St.2d 128, 228 N.E.2d 320,323-4 (1967). "The protection of the aesthetic sense of the community, while laudable, in my opinion, is 'not in the same league' with the protection of the right of free speech." - *Denecke, J. in Lenrich Associates v. Heyda*, 504 P.2d 112,7 (Ore. Sup.Ct., 1972).
- 372 - See the dicta in the following cases: *Tripp v. Richter*, 158 A.D. 136,9,142 N.Y.S. 563 (1913); *Commonwealth Water Co. v. Brunner*, 175 A.D. 153,8, 161 N.Y.S. 794 (1916); *Greenspan v. Yaple*, 189 N.Y.S. 115,9 (Sup.Ct., 1919), revd. on other grounds, 201 A.D. 575, 194 N.Y.S. 658 (1922); *White v. Knickerbocker Ice Co.*, 254 N.Y. 152,9, 172 N.E. 452 (1930) & *Mix v. Tice*, 164 Misc. 261,7, 298 N.Y.S. 441 (Sup.Ct., 1937).
- 373 - See, for example, *State Game & Fish Comn. v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940); *Burt v. Munger*, 314 Mich. 659, 23N.W.2d 117 (1946); *Snively v. Jaber*, 48 Wash.2d 815, 296 P.2d 1015, 57 ALR2d 560 (1956); *Duval v. Thomas*, 114 So.2d 791 (Fla. Sup.Ct., 1959), cert.den., 361 U.S. 930, 80 S.Ct. 368, 4 L.Ed.2d 352 (1960) & *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689 (1960). For citations to contrary decisions and for an evaluation of the conflicting views, which is beyond the scope of this article, see, inter alia, note, 5 Un.of Fla.L.R. 166,176 (1952); note, 9 Unv. of Kan.L.R. 91 (1960); comment, 14 Rutgers L.R. 837 (1960); *Gaudet, Water Recreation*, 52 Cal.L.R. 171 (1964); *Reis, Recreational Use of Inland Waters*, 40 Temp.L.Q. 155,171-180 (1967); note, 53 Ia.L.R. 1322,1342 (1968) & *Johnson & Morry, Filling & Building on Small Lakes*, 45 Wash.L.R. 27,35-7 (1970).
- 374 - Although the dicta cited in fn. 286, ante seem never to have been confirmed by a square holding, they apparently have never been questioned by the New York courts. It is true that in *Waters of White Lake, Inc. v. Fricke*, 282 A.D. 333, 123 N.Y.S.2d 400 (1953), affd.w.o., 308 N.Y. 899, 126 N.E.2d 568 (1955) the plaintiff, which claimed title to certain parts of the bed of a non-navigable lake, was denied an injunction restraining the defendants from passing over such parts. This decision, however, was based in part on the plaintiff's failure to prove title to all of the bed it claimed to own and in part on the probability that it would be impracticable to enforce an injunction restraining entry by the defendants on the underwater tracts to which the plaintiff had succeeded in establishing title because of their shape and location. The court not only failed to express doubt as to the existence or advisability of a rule that it would be a trespass for A to boat over lake bed owned by B, but impliedly recognized the existence of such a rule when it said (282 A.D. at 336); "Plaintiff could not have an injunction unless it also had a title."

It is, moreover, unlikely that the New York courts would hold that sec. 15-0701 was intended to modify this rule by legalizing all harmless intrusions over lake or stream bed owned by another. Although subd. (1) of the section has indeed legalized the flooding of another's land by impoundment or obstruction of the water, if the flooding causes no harm, and has therefore authorized what would have been a trespass at common law (*McCann v. Chasm Power Co.*, 211 N.Y. 301, 105 N.E. 416 (1914)), it does not follow that the section was intended to legalize trespasses committed by personal intrusion on the land of another, even when such intrusion is harmless. It is one thing to legalize a harmless flooding which, since it is not accompanied by personal entry, is not likely to impair the landowner's feeling of security in the possession of his land, the desire to nurture which feeling is one of the principal justifications for the common law rule that even harmless intrusions are actionable trespasses (as to this desire see *Mechem, The Peasant in His Cottage*, 28 *Sou. Cal. L.R.* 139 (1955), and as to this rule see *Torts Restat.* 2d, sec. 163 (1965)); but it would be quite another thing to legalize a trespass effected in person even though it is harmless. In such a case the landowner is quite likely to feel that the impregnability of his possession is seriously threatened, and to react by resorting to self help which only too often results in the physical conflict which the law is anxious to avoid. (*Holmes, The Common Law*, 213 (1881) and *Keeton, Trespass, Nuisance and Strict Liability*, 59 *Col. L.R.* 457, 469 (1959).)

- 375 - See p. 73, ante. Owners of land which merely commands a view of the lake and is not riparian to it are not in a position, of course, to defeat a claimed first amendment privilege merely by showing that the speaker is a trespasser, unless they own part of the lake bed, which would not usually be the case. They could, however, obtain relief from the towing of the sign comparable to that which it seems likely would be granted in the hypothetical case discussed at pp. 71-78, ante, if they could show that the beauty of their prospect had been impaired by the defendant to an unreasonable extent.
- 376 - That the public has the privilege of navigation in navigable water even though the underlying bed is in private ownership see 1 *Farnham, Law of Waters* 138 (1904); *Buffalo Pipe Line Co. v. N.Y., Lake Erie and West. Rr. Co.*, 10 *Ann. N.C.* 107, 113-4 (*N.Y. Sup. Ct.*, 1880); *State v. Narrows Island Club*, 100 *N. Car.* 477, 5 *S.E.* 411, 2 (1888); *Fulton Light Heat and Power Co. v. State of New York*, 200 *N.Y.* 400, 418, 94 *N.E.* 199 (1911); *Du Pont v. Miller*, 310 *Ill.* 140, 141 *N.E.* 423, 5 (1923) and *Bohn v. Albertson*, 107 *Cal. App.* 738, 238 *P. 2d* 128, 135 (1952).
- 377 - *Hague v. C.I.O.*, 307 *U.S.* 496, 515-6, 59 *S. Ct.* 954, 83 *L. Ed.* 1423 (1939); *Schneider v. State*, 308 *U.S.* 147, 163, 60 *S. Ct.* 146, 84 *L. Ed.* 155 (1939); *Kovacs v. Cooper*, 336 *U.S.* 77, 87, 69 *S. Ct.* 448, 93 *L. Ed.* 513, 10 *ALR 2d* 608 (1949); *Lloyd Corp., Ltd. v. Tanner*, 407 *U.S.* 551, 9, 92 *Sup. Ct.* 2219, 33 *L. Ed. 2d* 131 (1972) and *Grayned v. City of Rockford*, 408 *U.S.* 104, 115, 92 *S. Ct.* 2294, 33 *L. Ed. 2d* 222 (1972).

- 378 - *Hague v. C.I.O.*, 307 U.S. 496, 515-6, 59 S. Ct. 954, 83 L. Ed. 1423 (1939) and *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 Sup. Ct. 2294, 33 L. Ed. 2d 222 (1972).
- 379 - 1 *Farnham*, *Law of Waters* 142 (1904); *Peo. ex rel. N.Y. Central Rr. Co. v. State Tax Comn.*, 258 A.D. 356, 16 N.Y.S. 2d 812, *affd. w.o.* 284 N.Y. 616, 29 N.E. 2d 932 (1940) and *Kennebec Towage Co. v. State*, 142 Me. 327, 52 A. 2d 166, 170 (1947).
- 380 - 336 U.S. 77, 88, 69 S. Ct. 448, 93 L. Ed. 513, 10 ALR 2d 608 (1949).
- 381 - See pp.
- 382 - "The privilege of navigation, like the privilege to use a public highway, must be exercised for the purpose of legitimate navigation and in a reasonable manner." - *Torts Restat. 2d*, *com. d to sec. 193* (1965).
- 383 - See p. 72, *ante*.
- 384 - See p. 73, *ante*.
- 385 - See p. 78, *ante*.
- 386 - See pp. 73 and 78, *ante*.
- 387 - That the title to the bed of Cayuga Lake and to the beds of other large New York lakes is in the state of New York see *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437 (1923); *Granger v. City of Canandaigua*, 257 N.Y. 126, 9, 177 N.E. 394 (1931) and *Allen v. Potter*, 64 Misc. 2d 938, 9, 316 N.Y.S. 2d 790 (1970), *affd. w.o.*, 37 A.D. 2d 691, 323 N.Y.S. 2d 409 (1971).
- 388 - "The hand distribution of religious tracts is an age-old form of missionary evangelism...This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press." *Murdock v. Pennsylvania*, 319 U.S. 105, 108-9, 63 S. Ct. 870, 87 L. Ed. 1292, 146 ALR 81 (1943). See also *Martin v. Struthers*, 319 U.S. 158, 164-5, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).
- 389 - The first amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Sec. 3 of Art. 1 of the New York constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind;...but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

- 390 - Prince v. Massachusetts, 321 U.S. 158, 164-5, 64 S.Ct. 438, 88 L.Ed. 645 (1944). See also the quotation from Murdock in fn. 388, ante. While in Martin v. Struthers, 319 U.S. 141, 151-2, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) the court said in substance that no freedom ranked higher than freedom of religion, it did not say that this freedom stood higher than all others. Cf., however, Pfeffer, The Supremacy of Free Exercise, 61 Georgetown L.J. 1115, 1142 (1973).
- 391 - See p. 72, ante.
- 392 - Martin v. Struthers, 319 U.S. 141, 150, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) - when first amendment rights collide with others there should be an accommodation giving appropriate recognition to both; Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944) First amendment rights are not beyond limitation; Appeal of Trustees of the Congregation of Jehovah's Witnesses, Bethel Unit, 183 Pa. Super. 219, 130 A. 2d 240, 3, app. dismiss. for want of a substantial federal question, 355 U.S. 40, 79 Sup.Ct. 120, 2 L.Ed. 2d 71 (1957) - religious freedom is not an absolute right; and Peo. v. Woodruff, 26 A.D. 2d 236, 8, 272 N.Y.S. 2d 786 (1966), affd.w.o., 21 N.Y. 2d 848, 236 N.E. 2d 159, 288 N.Y.S. 2d 1004 (1968) - individual right of religious worship must be balanced against the interest which the state seeks to enforce.
- 393 - Brd. of Zoning Appeals of Decatur v. Decatur, Independent Company of Jehovah's Witnesses, 233 Ind. 83, 117 N.E. 2d 115, 8 (1954); U.S. v. Kissinger, 250 F. 2d 940, 3, cert. den., 356 U.S. 598, 78 Sup. Ct. 995, 2 L. Ed. 2d 1066 (1958); Allendale Congregation of Jehovah's Witnesses v. Grossman, 30 N.J. 273, 152 A. 2d 569, 571 (1959); Milwaukee Company of Jehovah's Witnesses v. Mullen, 214 Ore. 281, 330 P. 2d 5, 20, 74 ALR 2d 347 (1958), cert. den., 359 U.S. 346, 79 S.Ct. 940, 3 L. Ed. 2d 932 (1959); West Hill Baptist Church v. Abbate, 24 Oh. Misc. 66, 261 N.E. 2d 196, 201 (Oh. Com. Pl., 1969); Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 320, 319 N.Y.S. 2d 937 (Sup. Ct., 1971) and East Side Baptist Church of Denver, Inc. v. Klein, 487 P. 2d 549, 551 (Colo. Sup. Ct., 1971).
- 394 - 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1940).
- 395 - The court recognized, of course, that individuals, as long as they were not in an organized formation, could not constitutionally have been required to obtain a permit before carrying religious signs through the streets.
- 396 - 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).
- 397 - Although it was recently held in Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L. Ed. 2d 15 (1972) that it would be a violation of the first amendment right to the free exercise of religion to enforce against Amish parents a statute forbidding withdrawal of children from public school before they reached the age of 16, this decision was not based on a repudiation of the holding in Prince, but rather on the ground that Prince was distinguishable from Yoder in that the state, because of the excellent results achieved by the Amish when educating

their adolescents at home, was not able in *Yoder*, as it had been in *Prince*, to establish its possession of an interest sufficiently compelling to justify a curtailment of religious freedom.

- 398 - 183 Pa. Super. 219, 130 A. 2d 240, app. dismiss. for want of a substantial federal question, 355 U.S. 40, 79 Sup.Ct. 120, 2 L. Ed. 2d 71 (1957).
- 399 - 250 F. 2d 940, cert.den., 356 U.S. 958, 78 Sup.Ct. 995, 2 L. Ed. 2d 1066 (1958).
- 400 - 26 A.D. 2d 236, 272 N.Y.S. 2d 786 (1966), affd.w.o., 21 N.Y. 2d 848, 236 N.E. 2d 159, 288 N.Y.S. 2d 1004 (1968).
- 401 - *Martin v. City of Struthers*, 319 U.S. 141, 150, 63 S.Ct. 862, 87 L. Ed. 1313 (1943); *Watchtower Bible and Tract Society, Inc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 348, 79 N.E. 2d 333, 3 ALR 2d 423 (1948), cert. and reh.den., 335 U.S. 886, 912, 69 S.Ct. 232, 479, 93 L. Ed. 425, 445 (1948-9) and *Lenrich Associates v. Heyda*, 504 P. 2d 112 (Ore. Sup. Ct., 1972). And if a protest against the draft and the Viet Nam War can be classified as a religious as well as a political utterance, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 Sup.Ct. 2219, 33 L. Ed. 2d 131 (1972) can also be cited here.
- 402 - 22 N.Y. 2d 488, 239 N.E. 2d 891, 293 N.Y.S. 2d 297 (1968).
- 403 - 1 N.Y. 2d 508, 136 N.E. 2d 827, 154 N.Y.S. 2d 849 (1956).
- 404 - 22 N.Y. 2d 488, 497, 239 N.E. 2d 891, 293 N.Y.S. 2d 297 (1968).
- 405 - *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 139 Oh. St. 229, 39 N.E. 2d 515, 524 (1942) - Dictum; and *Ireland v. Bible Baptist Church*, 480 S.W. 2d 467 (Tex. Civ. App., 1972) writ of error refused, U.S. app. pending - holding. In *Evangelical Lutheran Church v. Sahlem*, 254 N.Y. 161, 172 N.E. 455 (1930) the court, without discussion or even mention of the first amendment problem, upheld a private covenant excluding churches; and in *Diocese of Rochester v. Planning Bd. of Town of Brighton*, 1 N.Y. 2d 508, 524, 136 N.E. 2d 827, 154 N.Y.S. 2d 849 (1956) the dictum in *Synod of Ohio* was quoted without critical comment.

Analogical support for this position is afforded by *Gordon v. Gordon*, 332 Mass. 197, 124 N.E. 2d 228, 234-5, cert. den., 349 U.S. 947, 75 S.Ct. 875, 99 L. Ed. 1273 (1955) in which it was held that a decree enforcing a provision in a will that if any of the testator's children should "marry a person not born in the Hebrew faith then I hereby revoke the gift...made to...such child" did not violate the first amendment guarantee of religious freedom. The comment on this case in *Lewis, Meaning of State Action*, 60 Col. L.R. 1083, 1117-8 (1960), *Selected Essays on Constitutional Law* 915 (1963) includes the following: "...one's privilege to deal with his own property as he chooses cannot lightly be dismissed."

However, in *West Hill Baptist Church v. Abbate*, 24 Oh. Misc. 66, 261 N.E. 2d 196, 200-2 (Oh. Com. Pl., 1969) it was held that it would violate the first amendment to refuse to allow a church to erect its house of worship on land the deed to which limited its use to agricultural and residential purposes. Although the court conceded that the United State Supreme Court had held that reasonable regulations of time and place for the exercise of freedom of religion can lawfully be imposed, it pointed out that the evidence failed to establish a public interest in the enforcement of the restriction, and that the private interest in the enjoyment of surrounding property and maintenance of its economic value was an insufficient basis for enforcement of the limitation.

- 406 - See p. 71 and fn. 341, ante and *West Hill Baptist Church v. Abbate*, 24 Oh. Misc. 66, 216 N.E. 2d 196, 202 (Oh. Com. Pl., 1969).
- 407 - See p. 71 and fn. 339, ante and *Prince v. Massachusetts*, 321 U.S. 158, 164, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Milwaukee Company of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 320 P. 2d 5, 21, 74 ALR 2d 347 (1958) and *East Side Baptist Church of Denver, Inc. v. Klein*, 487 P. 2d 549, 551 (Colo. Sup. Ct., 1971).
- 408 - See p. 22, ante.
- 409 - That the state has, however, an interest in the satisfaction of the desire of its citizens for the enjoyment of natural beauty and an interest in the prevention and resolution of disputes between private property owners, and that these public interests are great enough to enable sec. 15-0701 to qualify as a valid police power measure either in its present form or in the expanded form herein recommended see pp. 15-16, and 55-57, ante.
- 410 - 254 N.Y. 161, 172 N.E. 455 (1930).
- 411 - It is interesting to note that when in *Zaccaro v. Congregation Tiffereth Israel*, 20 N.Y. 2d 77, 228 N.E. 2d 772, 281 N.Y.S. 2d 773 (1967) the defendant defeated an action against it to enforce a covenant against religious structures, the first amendment was not included among the seven defenses which it offered, and that the court did not allude to that amendment.
- 412 - See pp. 71 and 83, ante.
- 413 - 22 N.Y. 2d 488, 239 N.E. 2d 891, 293 N.Y.S. 2d 297 (1968).
- 414 - Possibilities of this sort are referred to in *Leighty, Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L.R. 1347, 1355, 1391 (1971).
- 415 - See pp. 22-26, ante.
- 416 - As to the existence of such a privilege see *Bigelow, Natural Easements*, 9 Ill. L.R. 541, 3 (1915); *Matter of Application of Jacobs*, 98 N.Y. 98, 105, 50 Am. Rep. 636 (1885); *Sandyford Park Civic Assn. v. Lunneman*, 396 Pa. 537, 152 A. 2d 898, 900 (1959) and pp. 2-5, ante.

- 417 - As to the ability of a revised and expanded sec. 15-0701 to qualify as a valid police power measure see pp. 49-61, ante.
- 418 - See pp. 71-75, ante.
- 419 - That acts or conduct other than the utterance, display or publication of words are entitled to 1st amendment protection if but only if they are intended to convey and are capable of conveying a message see note, *Aesthetic Legislation Upheld*, 38 N.Y. Un. L.R. 1002, 6 (1963); note, *Symbolic Conduct*, 68 Col. L.R. 1091, 1109, 1113 (1968); note, *Prohibition of Long Hair*, 84 Harv. L.R. 1702, 9 (1971); note, *Freedom of Speech-Symbolic Protest*, 21 DePaul L.R. 546, 551 (1971); note, *High School Authorities and the Long-Haired Student*, 47 Tulane L.R. 407, 9 (1973); *Nimmer, The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L.R. 29, 36, 37, 44, 61 (1973); *Stromberg v. California*, 283 U.S. 359, 368-9, 51 S. Ct. 532, 75 L. Ed. 1117, 73 ALR 1484 (1931); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 ALR 674 (1943); *Garner v. Louisiana*, 368 U.S. 157, 202, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 8, 89 Sup. Ct. 733, 21 L. Ed. 2d 731 (1969); *Jackson v. Dorrier*, 424 F. 2d 213, 7, cert. den., 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed. 2d 88 (1970); *Richards v. Thurston*, 424 F. 2d 1281, 3 (1970); *King v. Saddleback Junior College Dist.*, 445 F. 2d 932, 7, cert. den., 404 U.S. 979, 92 S. Ct. 342, 30 L. Ed. 2d 294 (1971); *Karr v. Schmidt*, 460 F. 2d 609, 613, cert. den., 409 U.S. 989, 93 S. Ct. 307, 34 L. Ed. 2d 256 (1972) and *Akridge v. Barres*, 122 N.J. Super. 866, 300 A. 2d 866, 7 (1973). Although these requirements are not always stressed by the courts (see, for example, *Finot v. Pasadena City Bd. of Education*, 250 Cal. App. 2d 189, 199, 58 Cal. Rptr. 520 (1967), but cf. *Crownover v. Musick*, 9 Cal. 3d 405, 107 Cal. Rptr. 681, 509 P. 2d 497 especially at 506, 509, 510 (1973), the support for them cited above is sufficiently impressive to make it unlikely that judicial approval would often be given to the position taken in note, *Ordinance Prohibiting Business on Aesthetic Grounds*, 79 Harv. L.R. 1320, 2 (1966) that a use of property is an expression of the owner's aesthetic ideas and is therefore entitled to 1st amendment protection. As according the same weight to a choice of hairstyle see *Nimmer*, supra this note, at 59. It could well be argued that when an owner of land does no more than to use it in a certain way, he is merely attempting to express and gratify his own aesthetic tastes rather than to inform others of them or to persuade others to adopt them. Cf. p. 87 and fn. 429, post.
- 420 - The 5th amendment imposes an identical restraint on the federal government, which is made applicable to the states by the 14th; and it is provided in the last sentence of sec. 6 of Art. 1 of the New York constitution that "No person shall be deprived of...liberty... without due process of law."
- 421 - *Van Alstyne, Constitutional Rights of Public Employees*, 16 UCLA L.R. 751, 767 (1969).

- 422 - *Peo. v. Marcus*, 185 N.Y. 257, 9, 77 N.E. 1973 (1906) and *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 6, 42 Sup. Ct. 516, 66 L. Ed. 1044 (1922).
- 423 - *Meyer v. Nebraska*, 262 U.S. 390, 9, 43 S. Ct. 625, 67 L. Ed. 1042, 29 ALR 1446 (1923).
- 424 - *Griswold v. Connecticut*, 381 U.S. 479, 484, 487, 491, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). See also note, *The Abortion Cases: a Return to Lochner, or a New Substantive Due Process*, 37 Albany L.R. 776 (1973).
- 425 - *In re Jacobs*, 98 N.Y. 98, 106 (1885); *Kent v. Dulles*, 357 U.S. 116, 126, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) and *Shapiro v. Thompson*, 394 U.S. 618, 630, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).
- 426 - *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070, 39 ALR 468 (1925).
- 427 - *Breen v. Kahl*, 419 F. 2d 1034, 6, cert. den., 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed. 2d 268 (1969) and *Anderson v. Laird*, 437 F. 2d 912, 4, cert. den., 404 U.S. 865, 92 Sup. Ct. 68, 30 L. Ed. 2d 109 (1971). See also cases cited in fn. 438, post.
- 428 - See Note, *Aesthetics and Objectivity*, 71 Mich. L.R. 1438, 1461 (1973).
- 429 - Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 Wayne L.R. 1347, 1392 (1971). This suggestion seems distinguishable from and more persuasive than the one commented upon in the 2d par. of fn. 419, ante.
- 430 - *King v. California Unemployment Ins. Appeals Brd.*, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660, 4 (1972); *Stradley v. Andersen*, 349 F. Supp. 1120, 3 (1972) and *Akridge v. Barres*, 122 N.J. Super. 866, 300 A. 2d 866, 7 (1973).
- 431 - 12 N.Y. 2d 462, 472, 191 N.E. 2d 272, 240 N.Y.S. 2d 734 (1963).
- 432 - 12 N.Y. 2d 462, 191 N.E. 2d 272, 240 N.Y.S. 2d 734, app. dism. for want of a substantial federal question, 375 U.S. 42, 84 S. Ct. 147, 11 L. Ed. 2d 107 (1963).
- 433 - 31 N.Y. 2d 262, 6, 290 N.E. 2d 139, 338 N.Y.S. 2d 97 (1972). See also the *Samuels* and *Bismark* cases cited in fn. 53, ante.
- 434 - *Braxton v. Brd. of Public Instruction of Duval County*, 303 F. Supp. 958 (1969); *Richards v. Thurston*, 424 F. 2d 1281, 5 (1970); *Crews v. Clone*, 432 F. 2d 1259, 1263 (1970); *Burlingame v. Milone*, 62 Misc. 2d 853, 310 N.Y.S. 2d 407 (Sup. Ct., 1970); *Bishop v. Colaw*, 450 F. 2d 1068, 1075 (1971); *Lindquist v. City of Coral Gables*, 323 F. Supp. 11613 (1971); *Hunt v. Brd. of Fire Comrs.*, 68 Misc. 2d 261, 9, 327 N.Y.S. 2d. 36 (Sup. Ct., 1971); *Massie v. Henry*, 455 F. 2d 779, 783 (1972); *Arnold v. Carpenter*, 459 F. 2d 939, 941 (1972); *Harris v. Kaine*, 352, F. Supp.

769, 775-6 (1972); *Stull v. Brd. of Western Beaver High School*, 459 F. 2d 339, 347 (1972); *Friedeman v. Froehlke*, 470 F. 2d 1351 (1972); *Breese v. Smith*, 501 P. 2d 159, 168, 170 (Alaska Sup. Ct., 1972) - held created by Alaska Const.; *Blaine v. Brd. of Education of Haysville School Dist.*, 210 Kan. 560, 502 P. 2d 693, 697-8 (1972); *Stradley v. Andersen*, 478 F. 2d 188, 190 (1973) and *Dwan v. Barry*, 483 F. 2d 1126, 1130 (1973). See also cases cited in fn. 427, ante.

The following passage from *Kent v. Dulles*, 357 U.S. 116, 126, 78 Sup. Ct. 1113, 2 L. Ed. 2d 1204 (1958), in which the freedom to travel was recognized, can easily be read as an indirect affirmation of the existence of a constitutional right, liberty or freedom to wear one's hair in any style or to wear a beard; and was expressly so interpreted in *Finot v. Pasadena City Brd. of Education*, 250 Cal. App. 2d 189, 198, 58 Cal. Rptr. 520 (1967): "Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears or reads."

435 - Namely, *Gfell v. Rickelman*, 441 F. 2d 444, 7 (1971). Whether in *Freeman v. Flake*, 448 F. 2d 258 (1971), cert. den., 405 U.S. 1032, 92 S. Ct. 1292, 31 L. Ed. 2d 489 (1972) the existence of a right to choose one's beard or hair style was actually denied seems doubtful. It is true that the court said that because "The states have a compelling interest in the education of their children" and "acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools," complaints "based on nothing more than school regulations of the length of a student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts" (at pp. 261-2). But by this statement the court did not deny, at least expressly, nor even by necessary implication, that a beard or hairstyle liberty or freedom exists and could successfully be claimed even in a federal court if the claimant were not a student in a public school, and if the liberty or freedom were not outweighed in the particular instance by some more important interest.

And although in *Karr v. Schmidt*, 460 F. 2d 609, cert. den., 409 U.S. 989, 93 S. Ct. 307, 34 L. Ed. 2d 256 (1972) the circuit court said at p. 616: "In view of our holding that there is no substantial constitutional right to wear hair in the fashion that suits the wearer, the conclusion is inescapable that the district court erred in enjoining the enforcement of the Coronado High School hair regulation," it is doubtful that the court meant to hold that under no circumstances can a constitutional hairstyle freedom be recognized. In view of the language appearing at pp. 615 and 618 and set forth below, the statement already quoted should be interpreted rather as indicating that although a high school student can only under exceptional circumstances successfully assert a hairstyle freedom against the administrators of his school, because of the importance of keeping school management in the hands of the local school boards, and because it is advisable to avoid crowding the federal courts with litigation involving relatively trivial

issues, there is nevertheless a constitutionally created hairstyle freedom which would invalidate so extreme a statute as one requiring all male citizens to have a crew cut and all females to wear pigtaails. The court said: "We think it plain that individual liberties may be ranked in a spectrum of importance. At one end of the spectrum are the great liberties such as speech, religion, and association specifically guaranteed in the Bill of Rights. Of equal importance are liberties such as the right of marital privacy that are so fundamental that, even in the absence of a positive command from the Constitution, they may be restricted only for compelling state interests. At the other end of the spectrum are the lesser liberties that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action...The question before this court is where on the spectrum lies the asserted right of a high school student to wear hair in school at the length that suits him. It is our firm belief that this asserted freedom does not rise to the level of fundamental significance which would warrant our recognition of such a substantial constitutional right. We are influenced to this decision by numerous factors. First, the interference with liberty is a temporary and relatively inconsequential one... We do not have here 'a nation bent on turning out robots...insist(ing) that every male have a crew cut and every female wear pigtaails.' Secondly, we feel compelled to recognize and give weight to the very strong policy considerations in favor of giving local school boards the widest possible latitude in the management of school affairs...In conclusion, we emphasize that our decision...evinces not the slightest indifference to the personal rights asserted by Chesley Karr...Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small...The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could even enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life." See also in the Karr opinion fns. 13 and 26 in which the court said: "It seems to us patently absurd to suggest that our decision...provides a basis for sustaining a state regulation requiring conventional haircuts for the general adult population...grooming regulations are subject to the requirement that they not be wholly arbitrary. Thus, this rule of per se validity would not apply to a regulation which has an arbitrary effect, as, for example, a rule requiring that all male students shave their heads."

- 436 - See Van Alstyne, *Constitutional Rights of Public Employees*, 16 UCLA L. R. 751, 768-9 (1969) and Ely, *Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1243 (1970).
- 437 - 392 F. 2d 697, 703, cert. den., 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed. 2d 125 (1968). For additional illustrations of this approach see *Akin v. Bd. of Education of Riverside Dist.*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968) cert. den., 393 U.S. 1041, 89 S. Ct. 668, 21 L. Ed. 2d 590 (1969); *Raderman v. Kaine*, 411 F. 2d 1102, cert. den., 396 U.S.

976, 90 S.Ct. 467, 24 L. Ed. 2d 447 (1969); *Jackson v. Dorrier*, 424 F. 2d 213, 8, cert. den., 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed. 2d 88 (1970); *Stevenson v. Brd. of Education of Wheeler County*, 426 F. 2d 1154, cert. den., 400 U.S. 957, 91 S. Ct. 355, 27 L. Ed. 2d 265 (1970); *Anderson v. Laird*, 437 F. 2d 912, cert. den., 404 U.S. 865, 92 S. Ct. 68, 30 L. Ed. 2d 109 (1971); *King v. Saddleback Junior College Dist.*, 445 F. 2d 932, 9, cert. den., 404 U.S. 979, 92 S. Ct. 342, 30 L. Ed. 2d 294 (1971); *Gere v. Stanley*, 453 F. 2d 205, 7 (1971); *Freeman v. Flake*, 448, F. 2d 258, 261, cert. den., 405 U.S. 1032, 92 S. Ct. 1292, 31 L. Ed. 2d 489 (1972); *Karr v. Schmidt*, 460 F. 2d 609, 616-8, cert. den., 409 U.S. 989, 93 S. Ct. 307, 34 L. Ed. 2d 256 (1972); *Blaine v. Brd. of Education of Haysville School Dist.*, 210 Kan. 560, 502 P. 2d 693, 697-8 (1972); *Stradley v. Andersen*, 478 F. 2d 188, 191 (1973) and *Greenwald v. Frank*, 40 A.D. 2d 717, 337 N.Y.S. 2d 225 (1972), *affd. w.o.*, 32 N.Y. 2d 862, 299 N.E. 2d 895, 346 N.Y.S. 2d 529 (1973) - *semble*. However, in a substantial number of cases it has been held not only that a constitutionally created freedom of hairstyle exists, but that the claimant of that freedom was entitled to judgment because the evidence did not show that the freedom was outweighed by other interests. See, for example, all of the cases cited in fn. 434, ante, except *Stradley v. Andersen*.

438 - See p. 87 and fns. 429 and 430, ante.

439 - See cases cited in fn. 437, ante.

440 - See pp. 7-8 and 23, ante.

441 - As to the state's interest see pp. 15-16 and 55-57 and fn. 409, ante.

442 - For the few facts assumed see pp. 86-87, ante.

443 - See, for example, *Ferrell v. Dallas Independent School Dist.*, 392 F. 2d 697, cert. den., 393 U.S. 865, 89 S. Ct. 98, 21 L. Ed. 2d 125 (1968) and *Karr v. Schmidt*, 460 F. 2d 609, cert. den., 409 U.S. 989, 93 S. Ct. 307, 34 L. Ed. 2d 256 (1972).

444 - See, for example, *Raderman v. Kaine*, 411 F. 2d 1102, cert. den., 396 U.S. 976, 90 S. Ct. 467, 24 L. Ed. 2d 447 (1969) and *Anderson v. Laird*, 437 F. 2d 912, cert. den., 404 U.S. 865, 92 S. Ct. 68, 30 L. Ed. 2d 109 (1971).

445 - See comment on *Ferrell* at p. 88, ante and *Richards v. Thurston*, 424 F. 2d 1281, 5 (1970). Cf. *Gianatasio v. Whyte*, 426 F. 2d 908, 9, cert. den., 400 U.S. 941, 91 S. Ct. 234, 27 L. Ed. 2d 244 (1970).

446 - That one constitutionally created freedom or liberty may rank higher than another and therefore be entitled to greater protection than the other see *Karr v. Schmidt*, 460 F. 2d 60, 615, cert. den., 409 U.S. 989, 93 S. Ct. 307, 34 L. Ed. 2d 256 (1972).

447 - "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of

his own person..." - *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 11 St. Ct. 1000, 35 L. Ed. 734 (1891). This passage was quoted in *Crews v. Cloncs*, 432 F. 2d 1259, 1264 (1970) and *Stull v. School Brd. of Western Beaver High School*, 459 F. 2d 339, 347 (1972) in support of a recognition of the existence of a constitutional freedom of hairstyle. See also *Massie v. Henry*, 455 F. 2d 779, 783 (1972).

- 448 - In this case, as in one in which A's first amendment rights were involved, if the court found that he had impaired the natural beauty of the lake or of its setting, it would probably omit any reference to the balancing required to determine whether the impairment would be unreasonable enough to constitute a violation of sec. 15-0701, and since substantially the same factors would have to be taken into account, would content itself with going through the balancing necessary to a decision as to whether the impairment wrought by A was sufficiently unreasonable to justify curtailment of his constitutional freedom of architectural self expression. See pp. 76-77, ante.
- 449 - See pp. 12-13, ante.
- 450 - See pp. 22 et seq., ante.
- 451 - The first sentence of sec. 11 of Art. 1 of the New York constitution reads as follows: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."
- 452 - This question could not arise under the section as it now stands; for the riparian right to beauty which it appears to have created is, like riparian rights in general, enforceable against all persons (*Olney v. Culluloo Park Co.*, 182 A.D. 560, 567-8, 169 N.Y.S. 843 (1918)), and not merely against the members of two specified classes of landowners.
- 453 - As to the privileges of use of a landowner at common law see fns. 238 and 416, ante.
- 454 - "It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals. We thus arrive at the point at which the demand for equality confronts the right to classify...Here, then, is a paradox: The equal protection of the laws is a 'pledge of the protection of equal laws.' But laws may classify. And 'the very idea of classification is that of inequality.' In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification... A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law." - Tussman and tenBroek, *Equal Protection*, 37 Calif. L.R. 341, 343-4 and 346 (1949), *Selected Essays on Constitutional Law* 789, 791-3 (1963). "...legislative

bodies may classify persons if the classification is based on some reasonable distinction having reference to the object of the legislation. ...Statutory classifications can only be sustained where there are real differences between the classes, and where the selection of the particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute." - *Ronda Realty Corp. v. Lawton*, 414 Ill. 313, 111 N.E. 2d 310, 312 (1953). The right to equal protection "does not require the states to treat all property owners identically, or to ignore differences of circumstances. It does require that state legislation shall similarly treat those similarly situated. Thus, the validity of challenged state legislation depends upon a judicial finding that the legislation employs a 'reasonable' statutory classification. It is thus proper for state legislation to aid landowners particularly in need of help, or to restrict landowners conspicuously exemplifying evil practices." The court "sustains the legislation except where the Court finds the implicit classification 'arbitrary' and 'without a reasonable basis' in the light of the purpose of the statute." - 5 Powell on Real Prop., sec. 752, pp. 512-3 (1971). In applying the equal protection clause "this court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways...The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of that legislation, so that all person similarly circumstanced shall be treated alike.'" - *Reed v. Reed*, 404 U.S. 71, 75-6, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971). This passage from *Reed* was quoted with approval in *Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

455 - See pp. 22-23, ante.

456 - 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1909).

457 - 194 Okla. 403, 158 P. 2d 707 (1945). Although the opinions in *California v. La Rue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) make no express reference to an equal protection problem, the case nevertheless seems pertinent here, because the court upheld a state prohibition of live sexual entertainment in bars licensed to dispense liquor by the drink.

458 - 146 Conn. 650, 153 A. 2d 822, 4 (1959).

459 - 270 Ala. 285, 117 So. 2d 399 (1960).

460 - 366 U.S. 420, 427-8, 81 S. Ct. 1101, 1153, 1218, 6 L. Ed. 2d 393 (1961).

461 - 16 Oh. St. 2d 128, 243 N.E. 2d 66 (1968), app. diss. and cert. den., 395 U.S. 163, 89 S. Ct. 1647, 23 L. Ed. 2d 174 (1969). See also *Cunningham, Scenic Easements*, 45 Denver L.J. 169 (1968) at pp. 245-254.

- 462 - 27 N.Y. 2d 124, 135-6, 216 N.E. 2d 647, 313 N.Y.S. 2d 733, app. dism. for want of a substantial federal question, 400 U.S. 962, 91 S. Ct. 367, 27 L. Ed. 2d 381 (1970). Although the opinions in *Golden v. Planning Brd. of Town of Ramapo*, 30 N.Y. 2d 359, 285 N.E. 2d 291, 334 N.Y.S. 2d 138, app. dism. for want of a substantial federal question, 409 U.S. 1003, 93 S. Ct. 440, 34 L. Ed. 2d 294 (1972) do not discuss the question of equal protection, the case nevertheless has relevance at this point because it upheld a zoning ordinance which provided in substance that land located near existing public improvements can be used for residential development sooner than land located at a greater distance from the public improvements, thus validating a discrimination against owners of the more distant land. That the court was justified in so doing see note, *Zoning Program for Phased Growth*, 47 N.Y. Un. L.R. 723, 759 (1972).
- 463 - See p. 8, ante.
- 464 - "Conventionally, legislation is allowed to proceed by degrees, experimentally resolving a felt problem by steps; it is not a hard and fast rule that government must legislate against all of a problem in order to legislate against any part of it." - Van Alstyne, *Constitutional Rights of Public Employees*, 16 UCLA L.R. 751, 760 (1969). "...a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind',...and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." - *McDonald v. Brd. of Election*, 394 U.S. 802, 9, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). See also *Cotton Club v. Okla. Tax Comn.*, 194 Okla. 403, 158 P. 2d 707 (1945); *Tussman and tenBroek, Equal Protection*, 37 Calif. L.R. 341, 8 (1949), *Selected Essays on Constitutional Law* 789, 794-5 (1963) and *State of Ohio v. Buckley*, 16 Oh. St. 2d 128, 243 N.E. 2d 66, 71 (1968), app. dism. and cert. den., 395 U.S. 163, 89 S. Ct. 1647, 23 L. Ed. 2d 174 (1969).
- 465 - As to the two-tiered approach and for a discussion of its possible fate see Gunther, *A Model for a Newer Equal Protection*, 86 Harv. L.R. 1, 8-20 (1972).
- 466 - Under the classification of fields of legislation employed in *Dandridge v. Williams*, 397 U.S. 471, 484, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) the recommended legislation, being for the protection of private aesthetic and economic interests in lands commanding a view of natural bodies of water, would appear to be in the social and economic fields, except in the unusual instances in which the freedoms of speech, religion and aesthetic expression can be shown to be more than colorably involved. As to such cases see pp. 71-91, ante.
- 467 - That the Burger court, while declining to broaden the area in which strict scrutiny must be applied in equal protection cases, has increased the degree of scrutiny to which legislation is subjected in areas in which

minimal scrutiny was formerly deemed sufficient, see Gunther, A Model for a Newer Protection, 86 Harv. L.R. 1, 18-20 (1972).

468 - See pp. 92-94, ante.

469 - That the land classification and discrimination against owners of a particular class of land involved in Golden (for the facts pertinent at this point see fn. 462, ante) could have survived the strict scrutiny test, see case comment, Limits of Permissible Exclusion in Fiscal Zoning, 53 Bost. Un. L.R. 453, 475, 480 (1973).

470 - See pp. 2-5, 7-9, 22-24 and 26-31, ante.

471 - See pp. 64-70, ante.

472 - See pp. 49-61, ante.

473 - See pp. 61-63, ante.

474 - See pp. 71-91, ante.

475 - See pp. 72-73, 77-84 and 89, ante.

476 - See pp. 91-95, ante.



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